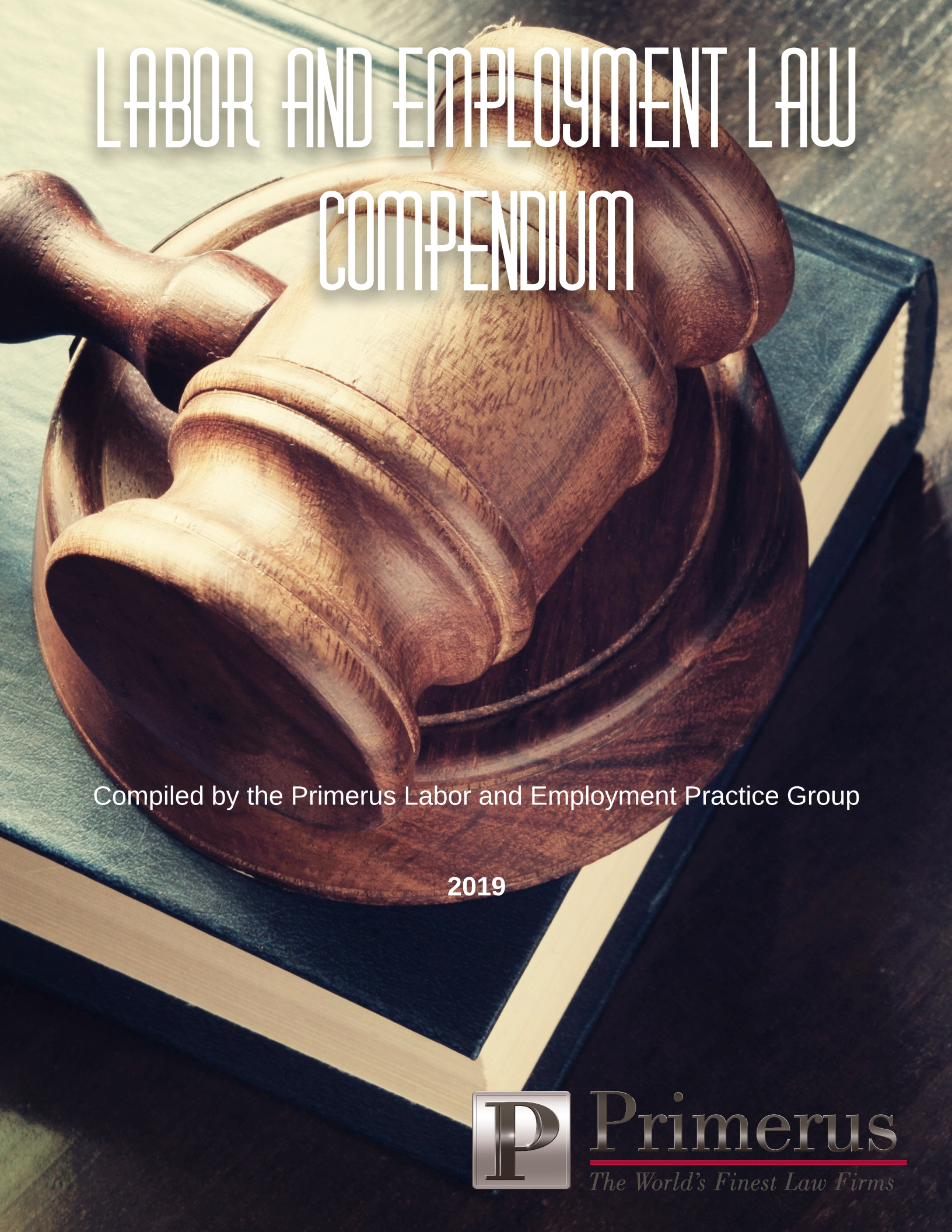

LABOR AND EMPLOYMENT LAW COMPENDIUM

Compiled by the Primerus Labor and Employment Practice Group

2019

Primerus

The World's Finest Law Firms

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INTRODUCTION

The employment relationship has undergone increasing scrutiny and has changed dramatically over the past several years. Evolving workplace trends, emerging case law, increasing emphasis on regulatory compliance, and changes in the scope of privacy rights make it necessary for businesses to pay attention to laws impacting labor and employment. In the United States, keeping up with these laws is challenging as the field of labor and employment law is a complex and interlocking web of both state and federal law. Each state maintains its own set of laws and is additionally governed by state federal regulatory authorities, including the Department of Labor, the National Labor Relations Board, and the Equal EmploymentOpportunity Commission, as well as a federal circuit court system which is established according to geographic regions.

This compendium of labor and employment law was prepared by members of the Labor and Employment Law Practice Group of the Primerus International Society of Law Firms, including contributions from members of both the Primerus Business Law Institute and Primerus Defense Institute. Primerus member firms are an international collection of labor and employment lawyers from independent firms who collaborate with one another to offer seamless and comprehensive multi-jurisdictional service to their clients. Lawyers from throughout the United States who routinely represent clients in the field of labor and employment law and litigation volunteered their time and expertise to prepare an overview of the law in all fifty states.

Primerus's labor and employment lawyers represent employers and management executives in litigation and administrative proceedings, preventive counseling and compliance services, audits and training, contract drafting, review and implementation, and dispute resolution. Human resource professionals and management executives utilize our services in order to navigate the many federal, state, and local laws that impact the employment relationship and to manage their risk in avoiding protracted and costly litigation. These services are provided by our Primerus member firms efficiently and without the large law firm price tag.

The areas of representation offered by Primerus labor and employment attorneys include:

- Federal and state administrative proceedings
- Litigation of federal, state, and common law employment torts
- Alternative dispute resolution
- Advice and counsel regarding regulatory compliance
- Management training
- Contract and policy preparation and implementation
- Response to employee complaints
- Union organizational activity, unfair labor practices charges, and proceedings under collective bargaining agreements
- Advising federal contractors of affirmative action obligations

Primerus attorneys represent a number of private and public entities in the defense of claims arising under the following federal laws:

- Defense of discrimination, harassment, wrongful discharge, and retaliation claims arising under Title VII of the Civil Rights Act/Section 1981
- Defense of claims and advice regarding the interactive process required under the Americans with Disabilities Act/Rehabilitation Act of 1973
- Defense of claims arising under the Age Discrimination in Employment Act
- Defense of wage disputes arising under the Fair Labor Standards Act
- Defense, advice and counsel relating to claims arising under ERISA/COBRA
- Defense, advice and counsel regarding compliance with Family Medical Leave Act
- Defense, advice and counsel regarding military service claims arising under USERRA
- OSHA and OFCCP Administrative Charges
- Section 1983 Statutory and Constitutional Claims
- Defense of claims arising under National Labor Relations Act
- Defense of agency charges and suits brought under state anti-discrimination laws

The purpose of this compendium is to provide a general reference relating to the applicable law in each state on issues relating to the field of labor and employment law and litigation. It is not intended to be a comprehensive discussion of the law in each jurisdiction, but simply to provide easy reference to the basic rules within each state. It is our hope that you will find this overview useful and informative when investigating and evaluating claims arising in the field of labor and employment law. This compendium is one of the ways lawyers belonging to the Primerus Labor and Employment Law Group stand ready to assist you in the event issues arise in this area.

ALABAMA

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1. Is the state generally an employment-at-will state?

Alabama is an employment-at-will state. Employees may be terminated “for good reason, bad reason, or no reason at all, and with or without prior notice.”

Of course, Alabama's at-will doctrine is subordinate to federal statutes and regulations governing employment relationships.

2. Are there any statutory exceptions to the employment-at-will doctrine?

a. Alabama Age Discrimination in Employment Act, 25-1-20 *et seq.*

The prohibitions of this statute mirror those of the federal ADEA, including retaliation against exercise or participation and opposition rights.

The statute mirrors the federal ADEA and expressly adopts the “remedies, defenses and statutes of limitations” of the federal ADEA. Lost wages, liquidated damages, reinstatement or front pay, equitable relief and attorney’s fees are available remedies.

In the 11th Circuit (Alabama, Georgia, and Florida) damages for mental anguish / emotional distress and punitive damages are not available under the ADEA. This holding should apply to the AADEA although no reported case has addressed this issue.

To be timely, a claim brought must:

(1) file a AADEA claim in a state court within 180 days from the occurrence of the alleged unlawful practice; or

(2) if employee files a charge with the EEOC within 180 days from the occurrence of the alleged unlawful practice and thereafter receives notice that the EEOC has dismissed the charge, the employee must file a AADEA claim in the state court within 90 days after the notice of dismissal of the charge.

A jury trial is available.

b. Workers’ Compensation retaliation, Ala. Code § 25-5-11.1:

Prohibits an employer from terminating an employee **solely** because the employee "instituted or maintained" any action against the employer to recover workers’ compensation benefits.

An employee's notice to an employer and request medical treatment serves to satisfy the "instituted or maintained" requirement.

A "constructive termination" violates the statute.

"Solely" is strictly applied. If there is any other legitimate reason for the employer's decision to terminate the employee, there is no violation of the statute.

A violation is considered a tort so lost wages, mental anguish / emotional distress and punitive damages are available relief.

The statute of limitations is two years.

A jury trial is available.

c. Report of safety violations, Ala. Code § 25-5-11.1:

Prohibits an employer from terminating an employee solely because the employee filed written notice of the violation of a specific written safety rule of the employer.

The notice must:

(1) Identity of the employee violating the safety rule;

(2) State the specific safety rule being violated;

(3) State that the identified employee has repeatedly and continually violated the safety rule, providing the times, dates and circumstances of such violations; and

(4) State the violation has placed the notifying employee at risk of injury or death.

The Alabama Supreme Court has held that an employee's multiple verbal complaints, followed by a formal complaint to a federal or state regulatory agency which the employer received, and which resulted in an investigation constitutes written notice.

A "constructive termination" violates the statute.

A violation is considered a tort so lost wages, mental anguish / emotional distress and punitive damages are available relief.

The statute of limitations is two years.

A jury trial is available.

d. Jury duty, Ala. Code § 12-16-8.1:

Prohibits an employer from subjecting an employee to adverse employment action solely because the employee serves on a jury in federal or state court, **provided** the employee reports to work on the next regularly scheduled hour after being dismissed from jury duty.

Jury service includes reporting for jury service; answering voir dire questions truthfully; listening to, observing, and weighing the evidence presented; observing the demeanor of witnesses; participating in deliberations; and ultimately rendering a verdict.

The statute does not protect illegal or inappropriate conduct, such as providing false information under oath during voir dire, receiving bribes as a juror, or assaulting another juror.

Actual and punitive damages are available for a violation of the statute.

The statute of limitations is two years.

e. Possession of firearms, Alabama Code §13A-11-90(c)(2):

Employees have the statutory right to leave in their personal vehicles either a pistol, if they have a valid concealed weapons permit, or any firearm that can be used for hunting purposes in Alabama other than a pistol.

Hunting firearms must be kept unloaded at all times while on an employer’s property and be stored out of sight. The employee must possess a valid Alabama hunting license and the employee can only possess the firearm in an employer’s parking lot during a recognized hunting season in Alabama.

The right to possess these firearms on an employer’s property extends only to private vehicles. An employee has no statutory right to leave a firearm in a company-owned vehicle.

The statute does not authorize employees to possess or store pistols or firearm on any part of the employer's property other than the parking lot.

An employer may not take adverse against an employee **IF** the employee has been in compliance with the statute.

An employer may be liable for lost wages, benefits or other remuneration caused by the unlawful adverse action.

An employer has the right to, but is required to patrol, inspect or secure its premises, including its parking lot, or to investigate, confirm or determine an employee's compliance with the statute.

An employer is absolutely immune from liability from any claim, cause of action or lawsuit brought by any person seeking any form of damages that are alleged to arise as the result of any firearm brought onto the property of the employer.

f. The Alabama EPA

This 2019 Statute provides an employer may not pay any of its employees at wage rates less than the rates paid to employees of another sex or race for positions within the same establishment which requires equal skill, effort, education, experience, and responsibility, and performance under similar working conditions…."

The statute contains four enumerated exceptions to this prohibition, which again mirror the federal statute:

(1) Discrepancies based on seniority systems;

(2) Merit systems;

(3) A system based on the quantity or quality of production; and

(4) A catch-all provision allowing for disparities to exist based on non-prohibited reasons.

The statute also contains provisions prohibiting an employer from refusing to interview, hire, promote, employ, or retaliate against any job applicant because the applicant does not provide wage history information.

Liability is restricted to an amount equal to the wages and interest resulting from the violation.

The period of liability is limited to two years.

A jury trial is available.

3. Are there any public policy exceptions to the employment-at-will doctrine?

The Alabama Supreme Court has refused to recognize **ANY** public policy exceptions to employment-at-will. All exceptions are restricted to the statutes discussed above.

4. Is there any law specifically governing public employment, including equal protection or due process?

The Alabama Constitution requires procedural due process from the deprivation of property interests arising in the context of public employment.

The Alabama Constitution has no Equal Protection clause and therefore does not create civil rights claims against public employers.

5. Is there any law related to the hiring process?

Alabama does not regulate applications questions. Employers also are free to conduct background, credit, employment history, and reference checks.

Advertising:

Alabama has two conditional provisions related to advertising available positions.

Age:

The Alabama ADEA prohibits an employer from advertising or posting any notice for a vacancy that indicates any "preference, limitation, specification or discrimination of [sic] age."

Drug-testing:

An employer with a qualifying drug testing program is eligible for a premium discount on workers' compensation insurance premiums. To have a qualifying program the employer must include notice that pre-employment drug-testing is required on vacancy announcements.

**Note: An employer is not required to have a drug-testing program, or to qualify a program with the Alabama Department of Labor. Qualification is only required if the employer wishes to obtain the insurance premium discount.

Employers may require post-offer medical examinations.

Alabama law provides that no *monetary* workers' compensation benefits shall be due if the employee knowingly and falsely misrepresents his or her physical or mental condition in a pre-employment medical examination and that condition is aggravated or re-injured in a compensable accident or exposure. *Medical benefits* available under the workers' compensation must still be provided.

Immigration:

Alabama has one of strictest immigration laws in the nation. Alabama prohibits employers from knowingly employing an unlawful alien. There are no monetary penalties but an employer can face suspension and permanent loss of business licenses and permits and the right to hold state contracts. Use of the federal e-system is mandatory and its use creates a conclusive presumption that an individual verified through the system is authorized to work in Alabama.

6. Does the state recognize implied employment contracts under employment handbooks, policies or practices?

Alabama law does recognize implied employment contracts based on handbooks, policies, procedures, practices and written and oral statements.

Employers can avoid being deemed to have created implied employment contracts with disclaimers:

“This Handbook and the policies contained herein do not in any way constitute, and should not be construed as a contract of employment between the employer and the employee, or a promise of employment.”

“Employer, at its option, may change, delete, suspend or discontinue any part or parts of the policies in this Employee Manual at any time without prior notice as business, employment legislation, and economic conditions dictate. No statement or promise by a supervisor, manager, or department head, past or present, may be interpreted as a change in policy nor will it constitute an agreement with an employee.”

Alabama law recognizes express verbal modifications of the employment-at-will relationship. A disclaimer can avoid such a finding:

“The at-will employment relationship cannot be modified except in writing signed by a designated official of the Company and the employee or a duly recognized representative of the employee.”

The employment-at-will relationship cannot be altered by promissory estoppel.

7. Does the state have a right to work law?

Alabama is a right to work state. See Ala. Code § 25-7-1.

8. Does the state have any labor management laws?

Alabama’s limited labor relations law is codified at Ala. Code § 25-7-1 *et seq.*, and is written to enforce its right to work provision.

9. What tort claims are recognized in the employment context?

ntentional Infliction of Emotional Distress / Outrage:

Alabama recognizes the tort of “outrage,” a/k/a intentional infliction of emotional distress. To be liable for outrage, an employer must engage in an act or omission with respect to Plaintiff that is so “outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society.” American Rd. Serv. Co. v. Inmon, 394 So. 2d 361; 1980 Ala. LEXIS 3303 (Ala. 1980).

Outrage has extremely limited application in the employment arena.

Workers' compensation:

In situations in which an employer / workers’ compensation insurance carrier withholds needed medical treatment, which the employer / carrier has a legal obligation to provide, in order to negotiate a settlement.

Sexual harassment:

An outrage may arise from *extreme* sexual harassment, but no court has ever found sexual harassment to be outrage. See *Logan v. Sears, Roebuck & Co.*, 466 So.2d 121, 124 (Ala. 1985) (quoting W. Prosser, *Law of Torts*, 54-55 (4th ed. 1971)(“Accordingly, it is generally held that there can be no recovery for mere profanity, obscenity, or abuse, without circumstances of aggravation, or for insults, indignities or threats which are considered to amount to nothing more than mere annoyances. The plaintiff cannot recover just because he has had his feelings hurt. Even the dire affront of inviting an unwilling woman to illicit intercourse has been held by most courts to be of no such outrage as to lead to liability – ‘the view being, apparently,’ in Judge Magruder’s well-known words, ‘that there is no harm in the asking.’”).

Discharge:

The Alabama Supreme Court mentioned that a claim of outrage could arise from the manner in which an employer

terminates an employee. Such a claim has never been formally recognized or applied in reported decisions.

Traditional tort damages are available in claims for outrage – compensatory damages, mental anguish and punitive damages. An award of attorney's fees is not available.

Outrage claims are tried to a jury.

Negligent Infliction of Emotional Distress :

Alabama does not recognize the tort of negligent infliction of emotional distress as a distinct cause of action. Alabama does allow damages for emotional distress in employment-related negligence claims such a negligent supervision or negligent.

Invasion of Privacy / Assault and Battery:

Alabama recognizes the traditional torts of invasion of privacy and assault and battery in the employment context. Claims of sexual harassment typically fall under these torts.

Although it has not done so yet, it is conceivable that Alabama courts could allow an invasion of privacy claim for allegations of harassment based on other protected class membership, such as race, national or ethnic origin.

Traditional tort damages are available – compensatory damages, mental anguish and punitive damages. An award of attorney's fees is not available.

Claims are tried to a jury.

Fraud:

Alabama law recognizes fraud-in-the-inducement, a/k/a "promissory fraud," in the hiring context. An employer can be held liable for fraudulently inducing an individual to give up current employment (with another employer) or forego other employment opportunities.

Damages are limited out-of-pocket damages. Mental anguish or punitive damages are not available. An award of attorney's fees is not available.

Claims are tried to a jury.

10. Is there a common law or statutory prohibition against discrimination / protected status harassment?

The Alabama Age Discrimination in Employment Act, Ala. Code § 25-1-20 *et seq.*, prohibits discrimination on the basis of age.

The statute mirrors the federal ADEA and expressly adopts the "remedies, defenses and statutes of limitations" of the federal ADEA.

The AADEA provides for right to trial by jury.

Other than the AADEA, Alabama has no statute addressing discrimination or harassment in the workplace.

Claims for harassment may be viable under a theory of invasion of privacy and possibly outrage. (See above).

11. Is there a common law or statutory prohibition of retaliation?

Alabama common law does not recognize any claim for retaliation. Alabama statutes do prohibit retaliation

Alabama statutes create five prohibitions against retaliation.

a. Alabama Age Discrimination in Employment Act, Ala. Code § 25-1-20 *et seq.*,

Employers are prohibited from discriminating against an employee (1) because the employee has opposed an unlawful action under the AADEA; or (2) because the employee made a charge, testified or assisted or participated in any investigation, proceeding or hearing under the AADEA. Ala. Code § 25-1-28.

The statute mirrors the federal ADEA and expressly adopts the "remedies, defenses and statutes of limitations" of the federal ADEA. Lost wages, liquidated damages, reinstatement or front pay, equitable relief and attorney's fees are available remedies.

In the 11th Circuit (Alabama, Georgia, and Florida) damages for mental anguish / emotional distress and punitive damages are not available under the ADEA. This holding should apply to the AADEA although no reported case has

addressed this issue.

To be timely, a claim brought must:

(1) file a AADEA claim in a state court within 180 days from the occurrence of the alleged unlawful practice; or

(2) if employee files a charge with the EEOC within 180 days from the occurrence of the alleged unlawful practice and thereafter receives notice that the EEOC has dismissed the charge, the employee must file a AADEA claim in the state court within 90 days after the notice of dismissal of the charge.

The AADEA provides for right to trial by jury.

b. Workers' Compensation retaliation, Ala. Code § 25-5-11.1:

Prohibits an employer from terminating an employee **solely** because the employee "instituted or maintained" any action against the employer to recover workers' compensation benefits.

An employee's notice to an employer and request medical treatment serves to satisfy the "instituted or maintained" requirement.

A "constructive termination" violates the statute.

"Solely" is strictly applied. If there is any other legitimate reason for the employer's decision to terminate the employee, there is no violation of the statute.

A violation is considered a tort so lost wages, mental anguish / emotional distress and punitive damages are available relief.

The statute of limitations is two years.

A jury trial is available.

c. Report of safety violations, Ala. Code § 25-5-11.1:

Prohibits an employer from terminating an employee solely because the employee filed written notice of the violation of a specific written safety rule of the employer.

The notice must:

(1) Identity of the employee violating the safety rule;

(2) State the specific safety rule being violated;

(3) State that the identified employee has repeatedly and continually violated the safety rule, providing the times, dates and circumstances of such violations; and

(4) State the violation has placed the notifying employee at risk of injury or death.

The Alabama Supreme Court has held that an employee's multiple verbal complaints, followed by a formal complaint to a federal or state regulatory agency which the employer received, and which resulted in an investigation constitutes written notice.

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d. Jury duty, Ala. Code § 12-16-8.1:

Prohibits an employer from subjecting an employee to adverse employment action **solely** because the employee serves on a jury in federal or state court, **provided** the employee reports to work on the next regularly scheduled hour after being dismissed from jury duty.

Jury service includes reporting for jury service; answering voir dire questions truthfully; listening to, observing, and weighing the evidence presented; observing the demeanor of witnesses; participating in deliberations; and ultimately rendering a verdict.

The statute does not protect illegal or inappropriate conduct, such as providing false information under oath during voir dire, receiving bribes as a juror, or assaulting another juror.

Actual and punitive damages are available for a violation of the statute.

The statute of limitations is two years.

e. Possession of firearms, Alabama Code §13A-11-90(c)(2):

Employees have the statutory right to leave in their personal vehicles either a pistol, if they have a valid concealed weapons permit, or any firearm that can be used for hunting purposes in Alabama other than a pistol.

Hunting firearms must be kept unloaded at all times while on an employer's property and be stored out of sight. The employee must possess a valid Alabama hunting license and the employee can only possess the firearm in an employer's parking lot during a recognized hunting season in Alabama.

The right to possess these firearms on an employer's property extends only to private vehicles. An employee has no statutory right to leave a firearm in a company-owned vehicle.

The statute does not authorize employees to possess or store pistols or firearm on any part of the employer's property other than the parking lot.

An employer may not take adverse against an employee **IF** the employee has been in compliance with the statute.

An employer may be liable for lost wages, benefits or other remuneration caused by the unlawful adverse action.

An employer is not required to (but has the right to) patrol, inspect or secure its premises, including its parking lot, or to investigate, confirm or determine an employee's compliance with the statute.

An employer is absolutely immune from liability from any claim, cause of action or lawsuit brought by any person seeking any form of damages that are alleged to arise as the result of any firearm brought onto the property of the employer.

f. The Alabama EPA

The statute also contains provisions prohibiting an employer from refusing to interview, hire, promote, employ, or retaliate against any job applicant because the applicant does not provide wage history information.

Liability is restricted to an amount equal to the wages and interest resulting from the violation.

The period of liability is limited to two years.

A jury trial is available

12. Is the state a deferral state for charges filed with the EEOC?

Alabama is not a deferral state.

13. Are there any state wage and hour laws?

There are no minimum wage or overtime laws in Alabama.

Alabama's child labor laws are codified at Ala. Code § 25-8-32 *et seq.*

14. Is there any state statue relating to payment of compensation?

Alabama has no statue or common law relating to the payment of compensation.

15. Is there a state statue governing medical leave?

Alabama does not have a law relating to mandatory medical leave.

16. Is there a statute governing paid time off other than for medical reasons?

When an employee is off work for jury duty, the employer cannot require the employee to use annual, vacation, unpaid leave or sick leave. Ala. Code § 12-16-8(b).

An employer must pay an employee his or her usual compensation when the employee is on jury duty. Ala. Code § 12-16-8(c).

17. Is there any state statute mandating that specific fringe benefits be provided?

Alabama has no law mandating specific fringe benefits.

18. Is there a state law governing military leave?

Ala. Code § 31-12-1 *et seq.*, governs military leaves in Alabama.

19. Is there a state law governing leave for voting?

Alabama provides no statutory right for time off to vote.

20. Are there any state laws governing leave for jury duty, court appearances or public service?

When an employee is off work for jury duty, the employer cannot require the employee to use annual, vacation, unpaid leave or sick leave. Ala. Code § 12-16-8(b).

An employer must pay an employee his or her usual compensation when the employee is on jury duty. Ala. Code § 12-16-8(c).

Ala. Code § 12-16-8.1 prohibits an employer from discharging or taking any other adverse employment action against an employee solely because the employee serves on any jury empaneled under any state of federal statute.

Jury service includes reporting for jury service; answering voir dire questions truthfully; listening to, observing, and weighing the evidence presented; observing the demeanor of witnesses; participating in deliberations; and ultimately rendering a verdict.

The statute does not protect illegal or inappropriate conduct, such as providing false information under oath during voir dire, receiving bribes as a juror, or assaulting another juror.

Actual and punitive damages are available for a violation of the statute.

The statute of limitations is two years.

21. Are workers' compensation claims an administrative or civil proceeding?

Workers' compensation disputes are litigated in the judicial system. The Alabama Workers' Compensation Act, Ala. Code § 25-5-1 *et seq.*

Other than the filing of a First Report of Injury and supplemental reports with the Alabama Department of Labor, there are no administrative proceedings related to workers;' compensation claims.

The Alabama Department of Labor, Workers' Compensation Division does offer an ombudsman program in which it provides state-paid mediators without charge to the litigants.

22. Is there an exclusivity provision in the state's workers' compensation law?

The Alabama Workers' Compensation Act does contain exclusivity and immunity provisions.

Claims related to the payment of benefits, such as intentional fraud and outrage are viable.

Alabama narrowly recognizes the "dual capacity" doctrine – Example: Employee driving company truck for a tire manufacturer is injured when defective tire manufactured by employer blows out. Products liability claim is not excluded.

Alabama recognizes "co-employee" claims for "willful misconduct." Ala. Code § 25-5-11. "Willful conduct" is defined by statute. The most common claim arises from the removal of a safety device supplied by the manufacturer.

23. Is there a state law governing drug-testing?

Alabama has a drug-free workplace statute. Ala. Code § 25-5-330.

The law does not prohibit or require drug-testing for applicants and/or employees. Ala. Code § 25-5-334(c).

An employer who certifies a drug-free workplace program with the Alabama Department of Labor qualifies for a 5% premium discount for its workers' compensation insurance coverage. Ala. Code § 25-5-332. Required elements for certification are found at Ala. Code § 25-5-333.

*** An employee who sustains an injury ordinarily compensable under the Alabama Workers' Compensation Act cannot recover monetary benefits if drug or alcohol intoxication caused the accident / injury.

Alabama has not passed a general medical or recreational marijuana statute. Alabama passed ALSB174 in 2014 which allows extremely limited prescriptions for the use of CBD-rich, low THC cannabis extracts.

CBD derived from industrial hemp, with a THC concentration of not more than 0.3% on a dry weight basis, can be legally produced, sold, and possessed in Alabama.

24. Does the state enforce covenants-not-to-compete, covenants-not-to-solicit and covenants-not-to-disclose in the employment context?

Alabama law related to restrictive covenants is codified at Ala. Code §8-1-190 *et seq.*

The statute begins with a general prohibition: "Every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind otherwise than is provided by this section is to that extent void."

The statute follows with expansive exceptions which are found in Ala. Code § 8-1-190: Exceptions applicable to employment are:

a. A contract between two or more persons or businesses or a person and a business limiting their ability to hire or employ the agent, servant, or employees of a party to the contract where the agent, servant, or employee holds a position uniquely essential to the management, organization, or service of the business.

b. An agent, servant, or employee of a commercial entity may agree with such entity to refrain from carrying on or engaging in a similar business within a specified geographic area so long as the commercial entity carries on a like business therein, subject to reasonable restraints of time and place.

Restraints of two years or less are presumed to be reasonable.

Geographic restraints limited to sphere of the employee's business influence (i.e., sales territories) are generally enforced. National or regional restraints are viewed skeptically

c. An agent, servant, or employee of a commercial entity may agree with such entity to refrain from soliciting current customers, so long as the commercial entity carries on a like business, subject to reasonable time restraints.

Restraints of 18 months or for as long as post-separation consideration is paid for such agreement, whichever is greater, are presumed to be reasonable.

There are no geographic restrictions for non-solicitation covenents.

Attempts to expand a non-solicitation to "prospective" customers are viewed as non-competition covenants.

The restrictive covenant must be based on a "protectable interest" which are designated by the statute, Ala. Code § 8-1-191:

a. Trade secrets, as defined in Ala. Code § 8-27-2;

b. Confidential information, including, but not limited to, pricing information and methodology; compensation; customer lists; customer data and information; mailing lists; prospective customer information; financial and investment information; management and marketing plans; business strategy, technique, and methodology; business models and data; processes and procedures; and company provided files, software, code, reports, documents, manuals, and forms used in the business that may not otherwise qualify as a trade secret but which are treated as confidential to the business entity, in whatever medium provided or preserved, such as in writing or stored electronically.

c. Commercial relationships or contacts with specific prospective or existing customers, patients, vendors, or clients.

d. Customer, patient, vendor, or client good will associated with any of the following:

(1) An ongoing business, franchise, commercial, or professional practice, or trade dress.

(2) A specific marketing or trade area.

(3) Specialized and unique training involving substantial business expenditure specifically directed to a particular agent, servant, or employee; provided that such training is specifically set forth **in writing** as the consideration for the restraint.

**Job skills in and of themselves, without more, are not protectable interests.

Restrictive covenants against professionals are unenforceable as a matter of public policy. The list of protected professionals includes medical, legal, and veterinary.

An employer who knowingly employs a person subject to a valid and enforceable restrictive covenant and who authorizes or allows that employee to violate the covenant can be sued for tortious interference with contract or business relations.

25. Is there trade secret / confidential information protection for employers?

The Alabama Trades Secrets Act, Ala. Code § 8-27-1 *et seq.* provides very broad protection for employers. Many employers attempt to use the Trades Secrets Act as a *de facto* non-competition covenant.

26. Is there a statute related to employment references or verifications of employment?

Alabama has no statute related to employment references or verifications. Common law torts may provide cause of action.

27. Is there any law related to access to personal records?

No. In Alabama personnel files and other employment related documents are the property of the employer. Absent a court or other legally enforceable order, an employer has no legal obligation to allow an employee or a third party to obtain copies or even review employment-related records.

28. Is there a state law governing the use of social media in the employment context?

None other than traditional privacy principles.

29. Is there any law governing weapons in the employment context?

Employees have the statutory right to leave in their personal vehicles either a pistol, if they have a valid concealed weapons permit, or any firearm that can be used for hunting purposes in Alabama other than a pistol.

Hunting firearms must be kept unloaded at all times while on an employer's property and be stored out of sight. The employee must possess a valid Alabama hunting license and the employee can only possess the firearm in an employer's parking lot during a recognized hunting season in Alabama.

The right to possess these firearms on an employer's property extends only to private vehicles. An employee has no statutory right to leave a firearm in a company-owned vehicle.

The statute does not authorize employees to possess or store pistols or firearm on any part of the employer's property other than the parking lot.

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An employer may be liable for lost wages, benefits or other remuneration caused by the unlawful adverse action.

An employer is not required to (but has the right to) patrol, inspect or secure its premises, including its parking lot, or to investigate, confirm or determine an employee's compliance with the statute.

An employer is absolutely immune from liability from any claim, cause of action or lawsuit brought by any person seeking any form of damages that are alleged to arise as the result of any firearm brought onto the property of the employer.

30. Is there any law governing the administration of polygraph tests?

Alabama has no statute or common law prohibition against the use of polygraph tests.

31. Is there any law protecting confidential information of employees?

None other than traditional privacy principles.

32. Is there any state law governing employer access to employee communications, including telephone, e-mail, texts, blogs, social media, etc.?

None other than traditional privacy principles..

33. Is there any law governing reductions in force of lay-offs?

No.

34. Is there any law restricting arbitration in the employment context?

Alabama's statute barring mandatory arbitration has been held preempted by the Federal Arbitration Act.

35. Is there a state safety law similar to OSHA?

Alabama has a statute providing generally that an employer has a duty to provide a safe workplace, but the statute does not contain detailed provisions or regulations creating specific obligations.

An employer is absolutely immune from liability from any claim, cause of action or lawsuit brought by any person seeking any form of damages that are alleged to arise as the result of any firearm brought onto the property of the employer.

ALASKA

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ARIZONA

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1. Is the state generally an employment-at-will state?

Yes. Arizona's policy of At-Will employment was codified in A.R.S. § 23-1501, which states that the public policy of the state is that the "employment relationship is severable at the pleasure of either the employee or the employer unless both the employee and the employer have signed a written contract to the contrary…" A.R.S. § 23-1501(a)(1)(2).

2. Are there any statutory exceptions to the employment-at-will doctrine?

Arizona provides a statutory exception to At-Will employment where a written employment agreement has been signed by both the employer and the employee. A.R.S. § 23-1501(a)(2). The statute also states that partial performance of employment shall not eliminate the requirement of a writing signed by the party to be charged. *Id*. If the employer terminates employment in breach of the written employment agreement, then the employee's claims and remedies are limited to breach of contract. A.R.S. § 23-1501(A)(3)(a).

3. Are there any public policy exceptions to the employment-at-will doctrine?

Arizona's public policy exceptions to At-Will employment are set forth in A.R.S. § 23-1501(A)(3)(b) and (c).

A.R.S. § 23-1501(A)(3)(b) states that an Arizona employee has a claim for wrongful termination if the employer terminated employment in violation of an Arizona statute, including the following:

- Arizona civil rights contained in A.R.S. Title 41, Chapter 9
- Arizona occupational safety and health act contained in Title 23, Chapter 2, Article 10
- Arizona statutes governing the hours of employment prescribed in Title 23, Chapter 2
- Arizona's agricultural employment relations act contained in Title 23, Chapter 8, Article 5
- Arizona statutes governing disclosure of information by public employees prescribed in Title 38, Chapter 3, Article 9.

A.R.S. § 23-1501(A)(3)(c) further states that an Arizona employee has a claim for wrongful termination if the employee was terminated by the employer in retaliation for any of the following:

- Employee's refusal to commit an act or omission that would violation the Constitution of Arizona or the statutes of Arizona
- The disclosure by an employee with a reasonable belief of the employer's violation of the Constitution or statutes of the state of Arizona and who makes such disclosure to a supervisor with the authority to investigate the information and prevent further violation.
- Employee's exercise of rights under Arizona's worker's compensation statutes as set forth in Title 23, Chapter 6
- Service on a jury as protected by A.R.S. § 21-236
- Employee's exercise of voting rights as protected by A.R.S. § 16-1012
- Employee's exercise of free choice with respect to membership in a labor organization as protected by A.R.S. § 23-1302
- Service in the National Guard or armed forces as protected by A.R.S. §§ 26-167 and 168
- Employee's exercise of the right to be free from extortion of fees and gratuities as a condition of employment as protected

by A.R.S. § 23-202

Employee's exercise of the right to be free from coercion to purchase goods or supplies from a particular person as a condition of employment as protected by A.R.S. § 23-203

Employee's exercise of a victim's right to leave work as provided in A.R.S. § 8-420 and A.R.S. § 13-4439

If the statute provides a remedy to an employee for a violation of the statute, then that those remedies are the "exclusive remedies" available to the employee. A.R.S. § 23-1501(B). If the underlying statute does not provide a remedy, then the employee shall have the right to bring a tort claim for wrongful termination in violation of the public policy set forth in the statute. A.R.S. § 23-1501(A)(3)(b).

If an employee brings a wrongful termination suit based on the breach of a written employment agreement, the prevailing party may be entitled to recover its reasonable attorneys' fees and costs as the matter arises out of contract. A.R.S. § 12-341.01. There are no Arizona statutes restricting the availability of jury trials in the employment setting. Arizona has one year statutes of limitations for bringing claims for "breach of an oral or written employment contract" and for "wrongful termination." A.R.S. § 12-541.

4. Is there any law related to the hiring process?

In 2007 the Arizona legislature passed the Legal Arizona Workers Act ("LAWA"), which is sometimes also called Arizona's "Employer Sanctions Law." LAWA went into effect on January 1, 2008 and prohibited businesses from knowingly or intentionally hiring an "unauthorized alien." The United States Supreme Court upheld the constitutionality of the Arizona statute in *Chamber of Commerce v. Whiting*, 62 U.S. 582 (2011).

LAWA is codified in A.R.S. § 23-211, *et seq.*, and is a complex network of judicial and administrative procedures created to enforce federal immigration laws. The statute requires all Arizona employers to confirm the employment eligibility of an employee by using the federal government's E-Verify program. A.R.S. § 23-214(A). The statute also requires Arizona employers to keep records of the E-Verify verification for the duration of the employee's employment or for at least three years, whichever is longer. *Id*. Individuals can file complaints with the state Attorney General (or county attorneys) to allege that an employer is either knowingly or intentionally employing unauthorized aliens. A.R.S. § 23-212, A.R.S. § 23-212.01. Potential remedies/penalties include the termination of employment of all unauthorized aliens, probation of three to five years, and the possible suspension or permanent revocation of all business licenses. *Id*.

A.R.S. § 23-1361(C) provides immunity from civil liability to employers who in good faith provide information about the termination, job performance, professional conduct, or evaluation of a former employee. The presumption of good faith is rebuttable by a showing of malice or intent to mislead. A.R.S. § 23-1361(D). The statute also provides civil immunity to a bank or lender which gives an employment reference advising that a former employee was involved in theft or embezzlement unless such information is false and was provided with malice and knowledge. A.R.S. § 23-1361(G) and (H).

Drug testing is discussed in Section 13 below.

5. Does the state recognize implied employment contracts under employment handbooks, policies, or practices?

A.R.S. § 23-1501(a)(2) provides a very limited exception for a "written contract [which] must be set forth in the employment handbook or manual or any similar document distributed to the employee, if that document expresses the intent that it is a contract of employment."

6. Does the state have a right to work law or other labor / management laws?

Arizona's status as a "Right-to-Work" state is clearly set forth in the Constitution of Arizona, Article XXIV, which states, "No person shall be denied the opportunity to obtain or retain employment because of non-membership in a labor organization, nor shall the state or any subdivision thereof, or any corporation, individual or association of any kind enter into any agreement, written or oral, which excludes any person from employment or continuation of employment because of non-membership in a labor organization." This language is repeated in A.R.S. § 23-1302.

7. What tort claims are recognized in the employment context?

It is not clear whether the common law tort for wrongful termination exists in Arizona. Arizona's Employment Protection Act ("EPA"), A.R.S. §§ 23-1501 and 23-1502, states that the EPA provides the exclusive remedy for the termination of employment in violation of public policy. A.R.S. §§ 23-1501(3)(b). However, the Arizona Supreme Court case of *Wagenseller v. Scottsdale Memorial Hosp.,* 710 P. 2d 1025 (Ariz. 1985), recognized a common law claim for wrongful termination based on a violation of public policy. In *Cronin v. Sheldon,* 991 P. 2d 231, 236 (Ariz. 1999) the Arizona Supreme Court upheld the constitutionality of

the EPA, and also expressly held that "neither the rationale nor the holding in *Wagenseller* is implicated by the EPA or by today's opinion.". Therefore the issue of "[w]hether a common law tort for wrongful termination still exists after the EPA is an open and much debated question in Arizona law." *Galati v. America West Airlines, Inc.,* 69 P. 2d 1011, 1015 (Ariz. App. 2003).

With regard to other tort claims which may arise in the employment context, the Arizona Supreme Court in *Cronin v. Sheldon* also said:

> "Importantly, the EPA does not . . . preclude wrongfully terminated employees from pursuing collateral common law tort claims related to discharge from employment, including intentional infliction of emotional distress, see Ford v. Revlon, Inc., 153 Ariz. 38, 734 P.2d 580 (1987), negligent infliction of emotional distress, see Irvin Investors, Inc. v. Superior Court, 166 Ariz. 113, 800 P.2d 979 (App.1990), interference with contractual relations, see Barrow v. Arizona Bd. of Regents, 158 Ariz. 71, 761 P.2d 145 (App.1988), or defamation, see Boswell, 152 Ariz. 9, 730 P.2d 186. Nor does today's decision affect such common law causes of action as assault and battery, fraud, and other protected claims."

991 P. 2d at 241.

8. Is there a common law or statutory prohibition against discrimination / hostile work environment?

A.R.S. § 23-1502(A) states that a claim of constructive discharge "may only be established" by:

> (i) outrageous conduct including sexual assault, threats of violence, a continuous pattern of discriminatory harassment if a reasonable employee would feel compelled to resign; or (ii) evidence of objectively difficult working conditions if the employee has given the employer at least 15 days notice of employee's intent to resign if the employer fails to respond to such concerns. *Id*. The employer must comply with statutory posting requirements to be entitled to the "safe harbor" requirement of 15 days prior written notice and an opportunity to respond. A.R.S. § 23-1502(E). Constructive discharge based on "outrageous conduct" requires no such prior written notice. A.R.S. § 23-1502(F).

See also generally, the response to question #3 above.

In addition:

> Arizona's Civil Rights Act ("ACRA") states that it is unlawful to discriminate against an employee on the basis of race, color, religion, sex, age, national origin, disability or the results of genetic testing. A.R.S. § 41-1463(B).
>
> Arizona's Employment Protection Act provides that an employee has a claim for wrongful termination if the employer has terminated the employment in violation of ACRA, *inter alia*. A.R.S. § 1501(A)(3)(b)(i).
>
> Service in the National Guard or armed forces is protected by A.R.S. §§ 26-167 and 168.
>
> Arizona's Medical Marijuana law provides that an employer may not discriminate in the hiring, termination or imposition of any other term or condition of employment based upon: (i) an individual's status as a registered cardholder for medical marijuana in the State of Arizona; or (ii) a positive drug test for marijuana, unless the patient used, possessed or was impaired by marijuana during the hours of employment or on the premises of the place of employment. A.R.S. § 36-2813(B).
>
> The Arizona cities of Phoenix, Tucson, Flagstaff, Sedona and Tempe have all passed local ordinances prohibiting discrimination on the basis of sexual orientation or gender identity in private employment, housing and public accommodations.

9. Is there a common law or statutory prohibition of retaliation?

Arizona's Employment Protection Act specifically authorizes a wrongful termination claim if employment was terminated in retaliation for the employee's exercise of rights protected under the Arizona Constitution or an Arizona statute, including: workers comp; service on a jury; exercise of voting rights; service in the National Guard or armed forces; whistle blower, *inter alia*. A.R.S. § 23-1501(A)(3)(c).

See also, the more detailed discussion of the AZ Employment Protection Act in Section 3 above.

10. Is the state a deferral state for charges filed with the EEOC?

Yes, Arizona is a deferral state, and an individual generally has 300 days from the alleged harm to file a charge with the EEOC for claims of discrimination based on race, color, national origin, sex, religion, disability and age. If an employer has fewer than 20 employees (age) or fewer than 15 employees (race, color, national origin, sex, religion, or disability), then a claimant in Arizona has 180 days to file a charge with the appropriate state agency.

The Arizona Attorney General's Office has concurrent jurisdiction together with the EEOC to investigate and make initial determinations regarding an employee's charges of discrimination. A.R.S. § 41-1481. A reasonable attorney's fees may be awarded if the employee is the prevailing party. *Id*.

11. Are there any state laws related to compensation, including wage and hour, paid time off, mandatory breaks, fringe benefits, allowable deductions, prevailing wage rates for public contracts, etc.?

Arizona's laws regarding Employment Practices and Working Conditions are generally contained in Title 23, Chapter 2.

Payment of wages is addressed in Title 23, Chapter 2, Article 7, which includes the following:

Arizona employers must designate two or more pay dates per month, not more than 16 days apart, for the payment of wages to employees. A.R.S. § 23-351(A). Employers whose principal place of business and payroll system are both located outside of Arizona may designate one or more days per month for the payment of wages to exempt employees or supervisors. A.R.S. § 23-351(B).

An employer must obtain the employee's prior written consent before making direct deposits of paychecks. A.R.S. § 23-351(D)(4).

An employer may only withhold wages under the following circumstances: (i) as authorized under state and federal laws; (ii) with prior written authorization from the employee; or (iii) if a reasonable good faith dispute exists as to the amount of wages due, including any claim by the employer of debt, reimbursement, recoupment or setoff. A.R.S. § 23-352.

A discharged employee must be paid all wages due in seven working days or by the end of the next regular pay period, whichever is sooner. A.R.S. § 23-353(A). An employee who quits shall be paid all wages due no later than the regular payday for the pay period during which the termination occurred; if requested by the employee, such payment may be by mail. A.R.S. § 23-353(B).

If an employer fails to pay wages in violation of Title 23, Chapter 2, Article 7, then the employee may recover treble the amount of the unpaid wages. A.R.S. § 23-355.

Minimum wages in Arizona are:

$11.00 on and after January 1, 2019

$12.00 on and after January 1, 2020, and thereafter minimum wage shall be increased by the cost of living on January 1 of each successive year.

A.R.S. § 23-363.

Tipped employees may be paid up to $3.00 less than the minimum wage if the employer can establish that the employee's wages combined with tips equals not less than minimum wage for all hours worked. *Id*.

If an employee asserts rights under Article 8 (Minimum Wage) and is subjected to an adverse employment action within 90 days, there is a "presumption" of retaliation which must be rebutted by clear and convincing evidence. A.R.S. § 23-364(A) and (B).

Arizona has enacted Mandatory Paid Sick Time - A.R.S. § 23-371, *et seq.*

Employers must provide Earned Paid Sick Time ("EPST") to all Arizona employees, including part time, temporary and seasonal workers as follows:

Employers with fewer than 15 employees must provide at least 24 hours of earned paid sick time (EPST) per year. Employers with 15 or more employees must provide a minimum of 40 hours of EPST per year. Employees may not accrue or use more than the statutory limit of EPST (24 or 40 hours) unless the employer selects a higher limit.

The employer must provide at least 1 hour of EPST for every 30 hours worked by the employee.

Employees must receive statements with their paychecks which set forth the amount of EPST earned, the amount used, the amount paid to the employee for EPST, and the amount of EPST remaining.

EPST may be used to care for the physical or mental health problems of the employee or their spouse, domestic partner, child, parent, grandparent, or family member of the employee. "Family member" is defined as an individual whose close association with the employee is the equivalent of a family relationship.

EPST may also be used to address sexual or domestic violence or a public health emergency.

The employee may use EPST in the smallest increment of time used by the employer for record keeping purposes.

While advance notice may be required for foreseeable events such as doctor's appointments, the employer may not refuse a request for EPST when needed to care for the employee or covered individual.

The employer may only request a doctor's note when the employee uses 3 or more consecutive days of EPST.

Unused EPST must be either cashed out or carried over at the end of the year.

If unused EPST is carried over, the employee remains subject to the statutory limitations on usage (24 or 40 hours).

EPST is not required to be paid out upon termination of employment.

An employer may not discriminate or retaliate against any employee for the lawful use of EPST or exercise of rights under the statute.

There is a "presumption" of retaliation if adverse action is taken against an employee within 90 days of using EPST, and the presumption must be rebutted by clear and convincing evidence. A.R.S. § 23-364(A) and (B).

Arizona's mini-COBRA statute - A.R.S. § 20-2330.

Arizona recently enacted a "mini-COBRA" statute which is effective for health care plans which are issued or renewed after December 31, 2018. Arizona's statute applies to employers with fewer than 20 employees and requires that:

Within 30 days of a Qualifying Event the employer must notify the employee of the availability of continuing health coverage at the full cost of coverage, including the employer's and the employee's share of the health care premium, and an administrative fee which is capped at 5%.

That the process and deadlines and the total cost of continued coverage must be set forth in the notice to the employee.

That separate notices are required for qualified dependents whom the employer knows do not live at the same address of the employee.

That continued coverage generally lasts for an additional 18 months but can end earlier if the employee becomes eligible for Medicare or Medicaid, or obtains other health care coverage, or fails to timely pay premiums.

Other Statutes:

Hours of labor for certain railroad, mine, laundry and agricultural workers. Title 23, Chapter 2, Article 5.

Minimum wages for minors. Title 23, Chapter 2, Article 6.

Equal wages for men and women. Title 23, Chapter 2, Article 6.1.

Wages and hours of public employees. Title 23, Chapter 2, Article 9.

12. Is there a state statue governing paid or unpaid leaves?

Earned Paid Sick Time

Employers must provide Earned Paid Sick Time to all Arizona employees. A.R.S. § 23-371, *et seq._See discussion in Section 11 above.*

Military

Members of the National Guard and US Armed Forces Reserves are entitled to leave to comply with orders to report for active duty, maneuvers, camps, training or drills. Time off may not impact an employee's vacation rights or seniority. A.R.S. § 26-168.

Voting

Employers must provide paid leave to employees whose regular schedule will not allow three consecutive hours to vote either at the beginning or the end of the work shift. An employee must apply for such leave prior to the election, and the employer can specify the hours of approved leave. A.R.S. § 16-402.

Jury Duty

An employer cannot penalize an employee for participating in jury service. The employer is not required to pay the employee and also cannot request that the employee use paid time off for time spent in jury service. An employee will not lose seniority for time spent serving on a grand or trial jury. A.R.S. § 21-236.

Crime Victim

An employer with 50 or more employees must allow an employee who is a victim of a crime with leave to attend a criminal proceeding or obtain an order of protection. The employer is not required to compensate the employee and may require the employee to use accrued paid time off. The employer may not discriminate, dismiss or deny seniority to an employee taking such leave. A.R.S. § 13-4439.

13. Is there a state law governing drug-testing?

Arizona statutes contained in Title 23, Chapter 2, Article 14 (A.R.S. § 23-493 *et seq.*) address drug testing of employees in Arizona. Drug testing shall occur during (or immediately before or after) work hours, and the employer will pay for all costs, transportation and employee's time involved in drug testing. A.R.S. § 23-493.02. An employer may charge prospective employees for the costs of drug testing. *Id*. A positive test shall require a second test by a different process to confirm the positive result. A.R.S. § 23-493.03.

An employer that establishes a policy and program in accordance with Arizona's statutes is protected from certain claims based upon: actions taken in good faith based on a positive result; failure to test or detect specific substances or conditions; actions based in good faith that the employee used, possessed or was impaired on the employer's premises or during hours of employment; actions to exclude an employee from a safety-sensitive position. A.R.S. § 23-493.06. The requirements of a valid drug testing policy are set forth in A.R.S. § 23-493.04 and include: a statement of the employer's substance abuse policy; description of the employees/applicants subject to testing; circumstances which require testing; substances subject to testing; description of testing/collection methods; consequences of refusal; potential adverse actions based upon testing results; right of the employee to obtain test results and explain a positive result in a confidential setting. Under certain circumstances the employer is also protected against claims based on false positive results or claims of defamation. A.R.S. §§ 23-493.07 and 23-493.08.

14. Is there a medical marijuana statute?

The Arizona Medical Marijuana Act (AMMA) is set forth in Title 36, Chapter 28.1 and provides that an employer may not discriminate in the hiring, termination or imposition of any other term or condition of employment based upon: (i) an individual's status as a registered cardholder for medical marijuana in the State of Arizona; or (ii) a positive drug test for marijuana, unless the patient used, possessed or was impaired by marijuana during the hours of employment or on the premises of the place of employment. A.R.S. § 36-2813(B).

A recent Arizona District Court Case held that termination of an employee solely for testing positive for marijuana metabolites is a "bright line" violation of the anti-discrimination provisions of the AMMA where there is no evidence of impairment during the hours of employment or on the employer's premises. *Whitmire v. Wal-Mart Stores Incorporated,* 2019 WL 479842 (D. Ariz. Feb. 7, 2019). Note that the *Whitmire* case did not involve a "safety sensitive position." *See discussion below.*

Arizona does permit employers to designate "safety-sensitive positions" which include tasks or duties which the employer in good faith believes could affect the health or safety of the employee or others. Examples of safety-sensitive positions include: operating a motor vehicle, machinery or power tools; repairing, maintaining or monitoring the performance of equipment or a manufacturing process where injury or property damage could result; duties in the residential or commercial premises of a customer, supplier or vendor; preparing or handling food or medicine; regulated and licensed occupations. A.R.S. § 23-493(9).

Arizona employers may exclude an employee from a safety-sensitive position based on the employer's good faith belief that the employee is engaged in the current use of any drug (including medical marijuana) which could cause an impairment or otherwise adversely affect the employee's job performance. A.R.S. § 23-493.06(A)(7).

15. Is there trade secret / confidential information protection for employers?

Arizona has adopted the Uniform Trade Secrets Act in A.R.S. §§ 44-401, *et seq.* (AUTSA). A.R.S. §§ 44-407 states that the AUTSA "displaces conflicting tort, restitutionary and other laws of this state providing civil remedies for misappropriation of a trade secret." The AUTSA does not affect contractual or criminal remedies, or other civil remedies not based on misappropriation of a trace secret. *Id*. Arizona's Court of Appeals held that while AUTSA preempts unfair competition claims to the extent based on misappropriation of a trade secret, the statute does not preempt claims based on misappropriation or misuse of confidential information which does not rise to the level of a trade secret. *Orca Communications Unlimited, LLC v. Noder,* 314 P.3d 89 (Ariz. Ct. App. 2013).

16. Is there any law related to employee's privacy rights?

Arizona prohibits any person from filming, taping, recording or secretly viewing another person without their consent in any locker room, restroom or other area where that person has a reasonable expectation of privacy. A.R.S. § 13-3019. There is an exception if the recording is for security purposes and notice is clearly posted. *Id*.

Arizona is a one party state for purposes of consent to recordings. A.R.S. § 13-3005; A.R.S. § 13-3012(9).

17. Is there any law restricting arbitration in the employment context?

The United States Supreme Court has held that agreements to arbitrate are enforceable in all employment relationships covered under the Federal Arbitration Act (FAA). *Circuit City Stores, Inc. v. Adam,* 532 U.S. 105, 118-19 (2001). Arizona does have two separate sets of arbitration statutes, A.R.S. § 12-1501 to 1518, and A.R.S. § 12-3001 to 3029, which both exclude disputes between an employer and an employee. *See,* A.R.S. § 12-1517 and A.R.S. § 12-3003(B)(1). But parties in Arizona may nonetheless agree to arbitrate their employment claims because the FAA generally preempts Arizona's statutory exclusions. *See, Doctor's Assocs., Inc. v. Casarotto,* 517 U.S. 681 (1996).

18. Is there any law governing weapons in the employment context?

An employer may prohibit the possession of firearms on the employer's premises. However, A.R.S. § 12-781 provides that a private employer shall not maintain or enforce a policy that prohibits a person from lawfully storing or transporting a firearm that is: (i) in the person's locked and privately owned motor vehicle or in a locked compartment on the person's privately owned motorcycle; and (ii) not visible from the outside of the motor vehicle or motorcycle. There is a limited exception for an employer that provides a parking lot, garage or other area that is secured by a fence, with access limited by a guard or other security measure, and where the employer provides temporary and secure firearm storage which is monitored and readily accessible on entry or exit from the premises. A.R.S. § 12-781(C)(3). An employer can also provide alternative and reasonably proximate parking for employees who wish to store a firearm in their vehicle as long as there is no additional charge for such parking. A.R.S. § 12-781(C)(8).

19. Miscellaneous employment or labor laws not discussed above?

Independent Contractors - Arizona has two statutes which permit an Arizona employer to create a rebuttable presumption that an individual is an independent contractor and not an employee.

> A.R.S. § 23-1601 sets forth the specific terms of a Declaration of Independent Business Status which an individual can acknowledge, sign and date. The creation and execution of this Declaration is optional, and the failure to execute such a Declaration does not create any presumptions and is not admissible as evidence of the lack of an independent contractor relationship. A.R.S. § 23-1601(A).
>
> A.R.S. § 23-902(D) also provides that a business can create a rebuttable presumption of an independent contractor relationship by entering into a dated, signed agreement that discloses that the independent contractor is not entitled to workers compensation benefits and contains other statements set forth in the statute. *Id*.
>
> If a commissioned salesperson is terminated all commissions (as defined by a written agreement) earned through the date of termination must be paid within 30 days, and all commissions earned after termination must be paid within 14 days of when they become due. A.R.S. § 44-1798.02 (A)(1). Treble damages for Failure to pay earned commission in a timely manner is subject to treble damages and an award of attorneys fees to the prevailing party. A.R.S. § 44-1798.02 (C)-(D).

Restrictive Covenants – This is a very limited summary of the current law in Arizona. To be enforceable restrictive covenants in Arizona must be reasonable, which generally means that the covenant must be no broader than necessary to protect the employer's legitimate interests. Covenants tied to the sale of a business are much more likely to be enforced. Attempts by an employer to prevent a former employee from working in a similar position after termination of employment (non-compete) are disfavored. Several Arizona courts have said that a reasonable non-compete should only last as long as it takes for the employer to replace and train a new employee. (Non-competes for doctors are subject to even higher scrutiny and are generally limited to six months.) Non-solicitation agreements must also be reasonable, and one court has opined that a non-solicitation agreement is simply a non-compete in disguise. Restrictive covenants must be supported by valid consideration. If a covenant is overly broad, the Arizona courts have limited authority to modify the covenant to make it enforceable. Under Arizona's blue pencil rule the court may not insert language or rewrite the covenant to make it enforceable. Instead the court is limited to striking unreasonable and "grammatically severable" provisions to create an enforceable covenant.

Good Faith and Fair Dealing – while the covenant of good faith and fair dealing is implied in all employment agreements, the covenant does not limit the employer to terminating employment only for good cause. *Wagenseller v. Scottsdale Memorial Hosp.,* 710 P. 2d 1025 (Ariz. 1985).

National Labor Relations Board – District 28 - Arizona falls within District 28 of the National Labor Relations Board, which is very aggressive in investigating and enforcing alleged violations of Sections 7 and 8 of the National Labor Relations Act against employers with both unionized and non-unionized workforces.

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1. Is there a common law or statutory prohibition against discriminatino / hostile work environment?

The Fair Employment and Housing Act, California Government Code § 12926 et seq. (FEHA) is the primary statutory scheme prohibiting discrimination in the workplace. Employees may also bring claims for violation of California Civil Code § 51.7, part of the Ralph Civil Rights Act of 1976, which broadly provides that all persons have the right to be free from violence and intimidation by threat of violence based on, among other things, race, religion, ancestry, national origin, political affiliation, sex, or position in a labor dispute.

FEHA prohibits discrimination by employers, a term that is defined as “any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly, the state or any political or civil subdivision of the state, and cities, except . . . a religious association or corporation not organized for private profit.” Gov’t. Code § 12926(d). In determining whether a person regularly employs five or more persons, all employees are counted, even if the employee does not work full time. *Robinson v. Fair Employment & Housing Commission,* 2 Cal.4th 226 (1992).

The California Fair Employment and Housing Act, Gov’t. Code § 12940(a), makes it an unlawful employment practice for an employer: to refuse to hire or employ any person; to refuse to select the person for a training program leading to employment; to bar or to discharge the person from employment or from a training program leading to employment; or to discriminate against the person in compensation or in terms, conditions, or privileges of employment based upon that person’s membership in a protected class. The statute provides the following protected classes: race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, gender, gender identity, gender expression, age, and sexual orientation of any person. It is also an unlawful employment practice to discriminate based upon the employer’s perception that the person has any of the protected characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics. Gov’t Code § 12926(m).

Discrimination based on pregnancy and breastfeeding is also prohibited. Gov’t Code § 12926(q)(1). Breastfeeding and related breastfeeding medical conditions are now included in protected class of "sex" as defined under the FEHA statutory scheme. Employers are now required by law to update their discrimination and harassment notices to reflect the change in this definition. (AB 2386; Gov’t Code § 12940, et seq.)

In addition, any woman disabled as the result of pregnancy or childbirth is entitled to protected leave. Pregnancy disability leave is provided in addition to any leave available under the California Family Rights Act. Gov’t Code § 12945.

An employer may not discriminate against an employee on the basis of his or her gender identity. Gender identity includes the employee’s sex or the employer’s perception of the employee’s identity, appearance, or behavior, whether or not that identity,

appearance, or behavior is different from that traditionally associated with the employee's sex at birth. Gov't Code § 12926(q)(1). Employees are specifically allowed to appear or dress in a manner consistent with their gender identity.

Reasonable accommodations must be made for employees with respect to religious dress and grooming practices. (Gov't Code 12940, et seq.)

Under Gov't Code § 12926, individuals with physical or mental disabilities are entitled to statutory protection. Unlike federal law, however, the disability need not "substantially" limit a major life function. Instead, a mental or physical disability is protected if it simply limits a major life activity, that is if it makes the achievement of the major life activity difficult. Gov't Code §§ 12926(k) and 12926.1(c). Another significant difference between California's statute and the federal Americans with Disabilities Act is that, in California, the disability is determined without consideration of mitigating measures such as medications, assistive devices, prosthetics, or reasonable accommodations. Gov't Code §§ 12926(i)(1)(A) and 12926(k)(1)(A).

The following conditions may qualify as a mental disability under FEHA:

- Posttraumatic stress disorder. *Jensen v. Wells Fargo,* 85 Cal.App.4th 245 (2000).
- Bipolar disorder. *Wills v. Sup. Ct.,* 194Cal.App.4th 312 (2011).
- Depression. *Auburn Woods Home Ass'n v. FEHC,* 121 Cal.App.4th 1578 (2009).
- Obsessive compulsive disorder. *Humphrey v. Memorial Hosp. Ass'n,* 239 F.3d 1128 (9th Cir. 2001).
- Adjustment disorder with mixed anxiety and depressed mood. *Diaz v. Federal Express Corp.,* 373 F.Supp.2d 1034 (C.D. Cal.2005).

FEHA also prohibits the sexual harassment of employees by employers. The provisions of the FEHA prohibiting harassment define "employer" as "any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities." Gov't Code § 12940(j)(4)(a). For the most part, "employer" does not include a religious association or corporation not organized for private profit. Gov't Code § 12940(j)(4)(b).

Employers are also responsible for harassment by non-employees where the employer knows or should have known of the sexual harassment and fails to take immediate and appropriate corrective action. Gov't Code § 12940(j)(1).

There is both a subjective and an objective component to a "hostile work environment" claim. A plaintiff who subjectively perceives the environment as hostile will not prevail of a reasonable person in the plaintiff's position would not share the same perception. *McCoy v. Pacific Maritime Association,* 216 Cal.App.4th 283 (2013).

The issue of whether the legislature, in passing the FEHA, intended to create a risk of personal liability in individual supervisory employees for acts of employment discrimination was addressed in *Janken v. GM Hughes Electronics,* 46 Cal.App.4th 55 (1996). In accordance with many courts around the country, the court in *Janken* determined that the statutory language in question did not intend to place such individual liability on supervisory employees. *Id*. at 62-63.

In setting forth the distinction between harassment and discrimination, the court in *Janken* determined that, while the legislature did intend to place individual supervisory employees at risk for personal liability for acts constituting harassment, they did not intend to do so for personnel decisions that may later be considered to be discriminatory. *Id*. at 63. The court stated as follows:

"[H]arassment consists of conduct outside the scope of necessary job performance; conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives. It is not conduct of a type necessary for management of the employer's business or performance of the supervisory employee's job."

Id. (citations omitted).

Effective January 1, 2015, AB 1443 amended Government Code section 12940 to expand anti-discrimination and anti-harassment prohibitions under the FEHA to include interns and those in training programs with respect to the "selection, termination, training or other terms or treatment of that person in any apprenticeship training program, any other training program leading to employment, an unpaid internship, or another limited duration program to provide unpaid work experience for that person because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status of the person."

Effective January 1, 2015, AB 1660 also amended the FEHA to say:

"National origin" discrimination includes, but is not limited to, discrimination on the basis of possessing a driver's license granted under Section 12801.9 of the Vehicle Code.

Pursuant to Vehicle Code section 12801.9, the Department of Motor Vehicles must issue a license to people who are not in the country legally if they are otherwise qualified for the license. Those licenses indicate on their face that the holder is allowed to drive, but the license "does not establish eligibility for employment, voter registration, or public benefits." Therefore, it is a

violation of the FEHA for employers to discriminate against employees because they hold such licenses, or to ask to see the license.

Using driver's licenses to confirm eligibility to work upon hiring is presumably still permitted since it is permitted by federal law. If an employee must drive as part of the job, checking a driver's license is appropriate.

Remedies

Before pursuing a civil suit for harassment or discrimination under California law, a plaintiff must first exhaust his or her administrative remedies by filing a complaint with the Department of Fair Employment and Housing (DFEH) or with the Equal Employment Opportunity Commission (EEOC).

It is important that the complaint specifically identify the discrimination and the perpetrators of the discrimination, or it may limit the remedies sought and people who can be sued in a civil case.

If an employee files with the Department of Fair Employment and Housing, he or she can ask the agency to not investigate the claim but, rather, simply immediately request a right-to-sue letter.

Generally speaking, a plaintiff must file a complaint with the Department of Fair Employment and Housing or the EEOC within one year of the harassing conduct. A plaintiff must file a claim with one of the governing entities before filing a lawsuit.

If the sexual harassment has occurred over a long period of time, the plaintiff can sometimes rely on the continuing violation doctrine. Under this doctrine, if it is found to apply, the sexual harassment complaint is timely if any of the discriminatory practices continues into the one-year limitations period.

If an employee sues under California law, he or she is entitled to recover damages for past and future medical and psychiatric expenses, past and future wage loss, damages for emotional distress and punitive damages.

To recover punitive damages, i.e., damages to punish the defendant employer, a plaintiff must prove:

that the employer hired or retained the discriminating individual with knowledge of his or her unfitness for the position and in conscious disregard of other's rights for safety;

authorized or ratified the wrongful conduct; or

was personally guilty of oppression, fraud or malice.

If the employer is a corporation, its knowledge, conscious disregard, authorization or act of oppression, fraud or malice must be on the part of a corporate officer, director or managing agent. A managing agent is a person who exercises substantial independent authority and judgment over decisions that ultimately determine corporate policy.

A plaintiff can prove that an employer's ratification for purposes of liability for punitive damage by establishing:

the employer adopted or approved of the action of the discriminator;

it can be inferred from the employer's failure, after being informed of the discrimination, that it ratified the conduct of the discriminator by such evidence as a failure to fully investigate and punish the discriminator.

If the plaintiff can prove discrimination, he or she is entitled to recover his or her attorney's fees as an element of damages.

Plaintiffs have a right to trial by jury in FEHA cases.

2. Is there a common law or statutory prohibition of retaliation?

FEHA also prohibits retaliation, which is any adverse employment action that results when an employee opposes practices that FEHA forbids, or the employee "has filed a complaint, testified, or assisted in any proceeding" under the FEHA. Gov't Code § 12940(h).

FEHA prohibits retaliation against "any person." Cal. Gov't Code § 12940(h). To establish a prima facie case of retaliation under the FEHA, plaintiff must show: (1) she engaged in a protected activity; (2) she was subject to an adverse employment action; and (3) there was a causal link between the protected activity and the adverse action. Yanowitz v. L'Oreal USA, Inc., 36 Cal.4th 1028, 1042, 32 Cal.Rptr.3d 436, 116 P.3d 1123 (2005).

An employee may not be terminated or otherwise discriminated against in retaliation for filing a Workers' Compensation claim. Labor Code § 132a.

Employers cannot prohibit employees from discussing or disclosing their wages, or for refusing to agree not to disclose their wages. Labor Code Sections 232(a) and (b).

Employers cannot require that an employee refrain from disclosing information about the employer's working conditions, or

require an employee to sign an agreement that restricts the employee from discussing their working conditions. Labor Code Section 232.5

Employers may not refuse to hire, or demote, suspend, or discharge and employee for engaging in lawful conduct occurring during nonworking hours away from the employer's premises. Labor Code Section 96(k). However, in Grinzi v. San Diego Hospice Corp., 120 Cal.App.4th 72 (2004), the court held that California Labor Code Sections 96(k) and 98.6 do not support a public policy against employee discharge based on lawful off-work conduct that is "otherwise unprotected by the Labor Code." Grinzi expands on the holding by the same appellate division in Barbee v. Household Automobile Fin. Corp., 113 Cal.App.4th 525 (2003), that Section 96(k) does not itself establish any public policy but only gives the Labor Commissioner jurisdiction over employee claims for violations of "recognized constitutional rights." Both the Grinzi and Barbee courts rejected broader interpretations that could have restricted employers' prerogatives to discipline employees for off-work conduct.

Employers cannot adopt any rule preventing an employee from engaging in political activity of the employee's choice. Labor Code Sections 1101 and 1102.

Employers cannot prevent employees from disclosing information to a government or law enforcement agency when the employee believes the information involves a violation of a

state or federal statute or regulation, which would include laws enacted for the protection of corporate shareholders, investors, employees, and the general public. Labor Code Section 1102.5.

California law provides that all employers shall grant temporary military leave to qualifying employees to serve in the uniformed services. Military & Veterans Code § 394 et seq. Private employers shall provide up to 17 unpaid days annually and public employers shall give up to 180 unpaid days in a year. Leave shall be available to any officer, warrant officer, or enlisted member of the military or naval forces of the state or the United States. The leave law also prohibits discrimination against any serviceperson because of his/her military service.

Employers cannot retaliate against employees for the employee's exercise of the right to take family care and/or medical leave. Gov't Code section 12945.2 (l).

An employer may not retaliate against an employee for taking time off to serve on a jury, provided that the employee provides reasonable notice to the employer that the employee is required to serve. Labor Code section 230.

Retaliation claims are inherently fact specific, and the impact of an employer's action in a particular case must be evaluated in context. Accordingly, although an adverse employment action must materially affect the terms, conditions, or privileges of employment to be actionable, the determination of whether a particular action or course of conduct rises to the level of actionable conduct should take into account the unique circumstances of the affected employee as well as the workplace context of the claim.

Yanowitz, 36 Cal.4th at 1052, 32 Cal.Rptr.3d 436, 116 P.3d 1123

However, "[m]inor or relatively trivial adverse actions or conduct by employers ... that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment and are not actionable." Id. Indeed, "[i]t is appropriate to consider plaintiff's allegations collectively under a totality of the circumstances approach."

Trulsson v. Cty. of San Joaquin Dist. Attorney's Office, 49 F. Supp. 3d 685, 693 (E.D. Cal. 2014) (citing California law).

Non-employer individuals (such as supervisors) may not be held individually liable for retaliation under FEHA. Jones v. The Lodge at Torrey Pines Partnership, 42 Cal.4th 1158 (2008).

As with other FEHA claims, remedies for retaliation in violation of the FEHA may include: (1) back pay; (2) reinstatement or front pay; (3) injunctive relief; (4) compensatory damages for pain and suffering, including emotional distress damages; (5) punitive damages; and (6) reasonable attorneys' fees and costs.

3. Is the state a deferral state for charges filed with the EEOC?

A deferral state is one in which a state or local Fair Employment Practices Agency ("FEPA") is authorized to enforce its state or local anti-discrimination laws. In California the Department of Fair Employment and Housing ("DFEH") is the FEPA and thus, the Equal Employment Opportunity Commission ("EEOC") generally defers to the DFEH during the first 60 days after a plaintiff files an administrative charge of discrimination or harassment when the charge includes a state or local law violation. A plaintiff in a deferral state must file an administrative charge with the EEOC within 300 days of the discriminatory conduct.

4. Are there any state laws related to compensation, including wage and hour, paid time off, mandatory breaks, fringe benefits, allowable deductions, prevailing wage rates for public contracts, etc?

A. Minimum Wage

As of January 1, 2018, California's minimum wage is $10.50 per hour for employers with 25 employees or less, and $11.00 per hour for employers with 26 employees or more. Over the next few years, the minimum wage will increase for said employers, respectively, as follows:

- January 1, 2019: $11.00/hour; $12.00/hour.
- January 1, 2020: $12.00/hour; $13.00/hour.
- January 1, 2021: $13.00/hour; $14.00/hour.
- January 1, 2022: $14.00/hour; $15.00/hour.

By January 1, 2023, minimum wage will be $15.00 per hour for all employers.

Some California jurisdictions have adopted local minimum wage ordinances or "living wages." These may apply to all employees working in the jurisdiction or they may apply only to entities doing business with the local jurisdiction. Compare, e.g., San Francisco Admin. Code Ch. 12R. Los Angeles, Oakland, San Jose, and many other cities have also adopted minimum wage or living wage ordinances.

1) Bond Requirement for Contesting Minimum Wage Violations

Effective January 1, 2017, any employer who contests an assessment for minimum wage violations must post a bond with the Labor Commissioner equal to the total amount of any minimum wages, liquidated damages, and overtime compensation that are due and owing as determined by the assessment, excluding penalties. Cal. Labor Code § 1197.1(c)(3). If the assessment is affirmed, the bond will be forfeited if the employer does not pay the damages at issue within 10 days of the entry of the judgment. Id. § 1197.1(c)(4).

B. The California Fair Pay Act

The California Fair Pay Act took effect on January 1, 2016. Codified in Labor Code section 1197.5, the California Fair Pay Act prohibits employers from paying any of its employees wage rates that are less than what it pays employees of the opposite sex for "substantially similar" work. Work is "substantially similar" if it is similar in "skill, effort, and responsibility, and performed under similar working conditions." Cal. Labor Code § 1197.5(a). Employers, however, may justify wage differential among its employees based on one or more of the following factors: seniority system; merit system; system that measures earnings by quantity or quality of production; and any bona fide fact other than sex. Id. § 1197.5(a)(1).

Effective January 1, 2017, the California Fair Pay Act was expanded to also prohibit wage disparity based on "race and ethnicity." Id. § 1197.5(b). The Act was also revised to clarify that "prior salary shall not, by itself, justify any disparity in compensation." Id. §§ 1197.5(a)(3) and 1197.5(b)(3).

C. Deductions from Pay

Employers must provide employees with itemized wage statements on paydays, containing the following information:

> (1) gross wages earned, (2) total hours worked by the employee (non-exempt employees only), (3) the number of piece-rate units earned and any applicable piece rate (if applicable), (4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item, (5) net wages earned, (6) the inclusive dates of the pay period, (7) the name of the employee and the last four digits of his or her social security number or an employee identification number other than a social security number may be shown, (8) the name and address of the legal entity that is the employer, and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate (for non-exempt employees only). Labor Code § 226(a).

Any employer that commits a "knowing and intentional" violation of this section and thereby causes an employee to "suffer injury" is liable for penalties in the amount of $50 per employee for the first pay period and $100 per employee for subsequent pay periods, up to an aggregate of $4,000. Id. § 226(e). In addition, an employer may be liable for civil penalties of $250 per employee for an initial violation and $1,000 per employee for a subsequent violation. *Id*. § 226.3.

An employee suffers an "injury" for purposes of section 226 when either "the employer fails to provide a wage statement" or the "employer fails to provide accurate or complete information as required by any one or more of [the nine items required by 226(a)] and the employee cannot promptly and easily determine from the wage statement alone" one or more of those nine items. "Promptly and easily" is defined to mean that "a reasonable person would be able to readily ascertain the information without reference to other documents or information." Labor Code § 226(e).

An employer may withhold or divert any portion of an employee's wages when the employer is required or empowered so to do by state or federal law or when a deduction is expressly authorized in writing by the employee to cover insurance premiums, hospital or medical dues, or other deductions not amounting to a rebate or deduction from the standard wage arrived at by collective bargaining or pursuant to wage agreement or statute, or when a deduction to cover health and welfare or pension plan contributions is expressly authorized by a collective bargaining or wage agreement. Labor Code § 224.

It is unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee. Labor Code § 221. An employer may legally advance commissions to its employees prior to the completion of all conditions for payment and, by agreement, charge back any excess advance over commissions earned against any future advance should the conditions not be satisfied. *Steinhebel v. Los Angeles Times Communications, LLC,* 126 Cal App 4th 696 (2005). [Commission agreement must be in writing and must specify the method by which commissions are computed and paid. The employee must get a signed copy, and the employer must obtain a written receipt from the employee. Labor Code § 2751.]

D. Overtime Rules

Non-exempt employees are entitled to overtime pay if they work more than eight hours in any workday. The overtime rate is time and one-half for all hours above eight and less than 12 in a single day. After 12 hours in a workday, the employee is entitled to double time. In addition, even if the employee does not work more than eight hours in any given day, but works more than 40 hours in a single workweek, he or she is entitled to receive overtime pay. Labor Code § 510.

If an employee works seven consecutive days in a workweek, he or she is entitled to time and one-half for the first eight hours worked on the seventh consecutive workday. Labor Code § 510. In addition, employees are entitled to double time for any time after the first eight hours if they work on the seventh consecutive day of any workweek.

1) Meal and Rest Periods

Employees are entitled to specified meal and rest periods. These breaks are specified in the wage orders adopted by the Industrial Welfare Commission (IWC), which are industry-specific. Most of the wage orders provide that any non-exempt employee who works more than five hours is entitled to a thirty-minute meal period. If the employee works less than six hours, the meal period may be waived by mutual consent. A second meal period is required for employees who work more than 10 hours. [The second meal period can be waived if only if the employee takes the first meal period and the total hours worked do not exceed twelve hours.] So long as the employee is relieved of all responsibility and permitted to leave the premises, the meal period is unpaid time.

Non-exempt employees are also entitled to one 10-minute rest period for each work period of four hours or major fraction thereof. The rest period should be at or near the middle of the work period. However, if the employee's total workday is less than three and one-half hours, no rest period is required.

California Labor Code § 226.7 prevents employers from requiring any employee to work during any meal or rest period mandated by an applicable order of the IWC.

If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest period is not provided.

The additional pay has been classified as a wage, rather than a penalty. *Murphy v. Kenneth Cole Productions, Inc.,* 40 Cal.4th 1094 (2007). The determination that the additional pay constitutes a wage means that the statute of limitations on such claims is three years, rather than the one year applicable to claims for penalties.

In *Brinker Restaurant Corp. v. Sup. Ct.,* 53 Cal.4th 1004 (2012) the California Supreme Court held that an employer is obligated to relieve its employee of all duties during a meal period or rest break, with the employee at liberty to use that break or period for whatever purpose the employee desires. The employer, however, has no obligation to ensure that the employee does no work. The employer must (1) provide employees an uninterrupted 30 minute meal period, (2) allow the employee to leave the premises, and (3) ensure the employee is relieved of all duty for the entire period. The court further provided that, consistent with the language of Labor Code section 512, an employer need not provide a second meal period until the end of the tenth hour of work for employees who work more than 10 hours in a day, regardless of when the employees finished their first meal period. Employees may waive the second meal period, with the consent of the employer, if they did not waive the first meal period and they do not work more than 12 total hours in the workday.

2) Cool Down Periods

Effective January 1, 2015, Labor Code §226.7 is amended to require employers to count as time worked any "recovery period." Section 226.7 defines "recovery period" as a "cooldown period afforded an employee to prevent heat illness." Before the passage of SB 1360, California law was silent on whether such recovery periods should be counted as paid time.

Section 226.7 now creates civil liability in the amount of one additional hour of pay to employees for each workday that the employer fails to provide a "cool-down" break.

E. Payment of Wages Upon Termination of Employment

If an employer discharges an employee, the employer must immediately pay all wages earned and unpaid at the time of discharge, including all accrued, unused vacation. Labor Code § 201. Vacation time is paid at the employee's final rate of pay, without regard to when the vacation pay was earned. Labor Code § 227.3. The place of the final wage payment for employees who are terminated (or laid off) is the place of termination. Labor Code § 208.

Generally, if an employee resigns from his or her employment with at least 72 hours of notice, final wages and vacation pay are due at the time of termination. If the employee has not given 72 hours notice, the final pay is due within 72 hours of the employee's final day of employment. The place of final wage payment for employees who quit without giving 72 hours prior notice and without specifically requesting that their final wages be mailed to them, is at the office of the employer within the county in which the work was performed. Labor Code § 208. However, an employee who quits without providing a 72-hour notice is entitled to receive payment by mail if he or she so requests and designates a mailing address. The date of the mailing constitutes the date of payment for purposes of the requirement to provide payment within 72 hours of the notice of quitting. Labor Code § 202.

If an employer willfully fails to pay the full amount of wages due to an employee upon termination, the employer may be subject to a waiting time penalty. This penalty is the employee's daily wage, payable for each day the wages remain unpaid, up to a maximum of 30 days. Labor Code § 203. The penalty accrues for each day the wages remain unpaid, including Saturdays, Sundays, and holidays. As a result, the maximum penalty will exceed the employee's monthly take-home pay. An employee is not entitled to the penalties if he or she refuses to accept full payment, including any penalty due under Labor Code § 203, or hides to avoid receipt of payment.

1. Fines for Failure to Timely Release An Employee's Personnel File Upon Request

Employers must respond to an employee's request for their personnel file within 30 days. Violation of this statute may result in a fine of $750, injunctive relief and attorneys' fees. Labor Code § 1198.5.

Employers are also required to permit employees to inspect or copy their payroll records. Labor Code §226(b.) When an employer who receives a written or oral request from a current or former employee to inspect or copy his or her payroll records, the employer shall comply with the request as soon as practicable, but no later than 21 calendar days from the date of the request. Failure by an employer to permit a current or former employee to inspect or copy his or her payroll records within the 21 calendar day period entitles the current or former employee to recover a penalty from the employer in a civil action before a court of competent jurisdiction. Labor Code §226(c) and (f).

2. Penalties for Labor Code Violations

The California Labor Commissioner, Division of Labor Standards Enforcement, may impose penalties for a variety of wage and hour law violations. For example, the civil penalties for failure to pay minimum wages or overtime are, for a first offense, $50.00 per employee per pay period for which the employee was underpaid and, for any subsequent offense, $100.00 per employee per pay period in which the employee was underpaid. Labor Code § 558. In

addition, an employer who willfully fails to maintain the records of employees' addresses, payroll records, and wage records required by law may be liable for a civil penalty of $500.00. Labor Code § 1174.5. Moreover, any person who violates the provisions regarding working hours and overtime pay "is guilty of a misdemeanor." Labor Code § 553.

Employees who are subjected to Labor Code violations are entitled to recover 25 percent of many of the civil penalties, which were previously available only in actions pursued by the California Labor Commissioner. The civil penalties may be awarded in addition to any other pre-existing remedies. Employees are required to give the Division of Labor Standards Enforcement and the employer notice of and the opportunity to cure a violation before proceeding with a lawsuit. Employees cannot pursue penalties over small, technical violations, such as the use of the wrong sized type on required workplace posters. Labor Code §§ 2698 and 2699.

3. Individual Liability: Officers, Directors, And Managers Held Not Personally Liable To Employees For Unpaid Overtime

In *Reynolds v. Bement*, 36 Cal.4th 1075 (2005), the plaintiff filed a class action lawsuit against his former company and its officers and directors, alleging that they intentionally misclassified him and other employees as exempt from overtime pay in violation of the California Labor Code. The California Supreme Court, in affirming the lower court's holding that the individual corporate agents were not personally liable for unpaid overtime wages, observed that the individual defendants were not "employers" under the Labor Code. *Id.* at 1085-86.

The California Supreme Court later abrogated the *Reynolds* holding that the applicable wage order of the Industrial Welfare Commission (IWC), and not the common law, defines the employment relationship and thus who may be liable in an action to

recover unpaid minimum wages. *Martinez v. Combs,* 49 Cal.4th 35 (2010). Thus, "'any person who directly or indirectly, or through an agent or other person, employed or exercised control over wages, hours or working conditions of any person may be liable,' is broad enough to reach through straw men and other sham arrangements to impose liability on the actual employer." *Id*. at 71. The Supreme Court held, however, that its holding in *Reynolds* that IWC's definition of employer does not impose liability on individual corporate agents acting within the scope of the agency is proper. *Id*. at 66.

F. Piece Rate Compensation Requirements and Affirmative Defense

On October 10, 2015, California Governor Jerry Brown signed Assembly Bill 1513, which added new requirements with regard to employees who work on a piece-rate basis. The new law, which amends California Labor Code section 226.2, changes the way employers are required to pay employees paid on a piece-rate basis. The new section 226.2 went into effect on January 1, 2016.

1. New Compensation Requirements

Piece rate and commission-paid employees must receive at least the minimum wage. Piece rate employees must also be paid at least the minimum wage for all time spent on tasks not specifically included in the piece rate.

Under the new law, employers are required to compensate employees who are paid on a piece-rate basis for rest and recovery periods and other nonproductive time separate from any piece-rate compensation. The law defines "other nonproductive time" as "time under the employer's control, exclusive of rest and recovery periods, that is not directly related to the activity being compensated on a piece-rate basis."

2. Compensation for Rest and Recovery Periods

The law requires employers to compensate piece-rate employees separately for rest and recovery periods at a regular hourly rate that is no less than the higher of:

> "An average hourly rate determined by dividing the total compensation for the workweek, exclusive of compensation for rest and recovery periods and any premium compensation for overtime, by the total hours worked during the workweek, exclusive of rest and recovery periods"; or

The applicable minimum wage rate (defined as "the highest of the federal, state, or local minimum wage that is applicable to the employment").

3. Compensation for Other non-Productive Time

Employers must pay employees for "other nonproductive time" at an hourly rate that is not less than the applicable minimum wage. Employers may determine the amount of an employee's other nonproductive time either through actual records or the employer's reasonable estimates for each pay period.

4. Timing of Payment

With regard to the timing of payment, the new law requires employers that pay employees on a semimonthly basis to compensate employees "at least at the applicable minimum wage rate for the rest and recovery periods together with other wages for the payroll period during which the rest and recovery periods occurred." Any additional compensation required for piece-rate employees whose rest and recovery periods are paid at an average hourly rate "is payable no later than the payday for the next regular payroll period."

5. Itemized Statements

The new law amends California Labor Code section 226.2 to require employers to:

> provide employees who are compensated on a piece-rate basis with itemized statements (as required under section 226(a)) separately stating
>
> the total hours of compensable rest and recovery periods,
>
> the employees' rate of compensation, and
>
> the employees' gross wages paid for those periods during the pay period; and
>
> provide employees who are compensated on a piece-rate basis with itemized statements (as required under section 226(a)) separately stating
>
> the total hours of other nonproductive time, as specified,
>
> the employees' rate of compensation, and
>
> the employees' gross wages paid for that time during the pay period

6. Compliance Timeline

Employers that pay employees for rest and recovery periods at the applicable minimum wage rate were given until April 30, 2016, to program their payroll systems to perform and record the average hourly rate calculation, and to comply with the itemized statement requirements, as long as they (1) pay piece rate employees for all rest and recovery periods at or above the applicable minimum wage from January 1, 2016, to April 30, 2016, inclusive, and (2) pay the difference between the amounts paid and the amounts that would be owed under the average hourly rate calculation, together with interest, by no later than April 30, 2016.

7. Employers' Affirmative Defense

Until January 1, 2021, the law gives employers an affirmative defense to any claim or cause of action for failing to timely pay employees for rest and recovery periods and other nonproductive time for time periods prior to and including December 31, 2015, if the employer complied by no later than December 15, 2016.

To qualify for this affirmative defense, employers must fulfill a number of obligations as set forth in the new law. These include the following:

> Employers must make payments to each of their employees for previously uncompensated or undercompensated rest and recovery periods and other nonproductive time from July 1, 2012, to December 31, 2015, inclusive, using one of two methods.

According to the first method, the employer determines and pays the actual sums due together with the accrued interest.

According to the second method, the "employer pays each employee an amount equal to 4 percent of that employee's gross earnings in pay periods in which any work was performed on a piece-rate basis from July 1, 2012, to December 31, 2015, inclusive, less amounts already paid to that employee, separate from piece-rate compensation, for rest and recovery periods and other nonproductive time during the same time." Employers may reduce the payment to each employee for amounts the employer already paid for rest and recovery periods and other nonproductive time as long as the reduction for other nonproductive time does not exceed 1 percent of the employee's gross earnings during the same time.

The employer is not required to pay employees for any part of the July 1, 2012, to December 31, 2015, time period if, prior to August 1, 2015, an employee entered into a valid release of claims for compensation for rest and recovery periods and other nonproductive time or if a release of claim was executed in connection with a settlement agreement filed with a court prior to October 1, 2015, and later approved by a court.

By no later than July 1, 2016, employers must have provided written notice to the Department of Industrial Relations of their election to make payments to current and former employees in accordance with the new law. AB 1513 requires the notice to include the legal name and address of the employer and to be mailed or delivered to the Director of Industrial Relations. The law also specifies that the director may provide for an email address to receive notices electronically. In addition, the Department of Industrial Relations will publish a list of employers that have provided the required notice or copies of employers' notices on its website until March 31, 2017.

Employers must calculate and begin making payments to employees as soon as reasonably feasible after providing notice to the Department of Industrial Relations. Employers must have completed the payments by no later than December 15, 2016. Employers that are unable to locate an employee to which wages are due may make their payments to the Labor Commissioner. Note that employers that make payments to the Labor Commissioner must pay an additional administrative fee into the Labor Enforcement and Compliance Fund.

Employers must provide each employee receiving a payment with an accurate statement accompanying the payment. The statement must include the following information:

> a statement that the payment has been made pursuant to the affirmative defense;
>
> a statement as to which formula was used to determine the payment; and

Employers using the first method must also include "a statement, spreadsheet, listing, or similar document that states, for each pay period for which compensation was included in the payment, the total hours of rest and recovery periods and other nonproductive time of the employee, the rates of compensation for that time, and the gross wages paid for that time."

Employers using the second method, must include "a statement, spreadsheet, listing, or similar document that shows, for each pay period during which the employee had earnings during the period from July 1, 2012, through December 31, 2015, inclusive, the gross wages of the employee and any amounts already paid to the employee, separate from piece-rate compensation, for rest and recovery periods and other nonproductive time."

the calculations that the employer used to determine the total payment made.

Employers do not lose the affirmative defense for making a "good faith error" in payments if the employer makes the payment

with interest “within 30 days of discovery or notice of the error.”

G. Reimbursement for Business Use of Personal Items

Employees are entitled to be reimbursed for business use of personal items (such as cell phones, laptops, and/or automobiles) if necessary to perform their job duties. Labor Code § 2802.

5. Is there a state statute governing paid or unpaid leaves?

A. Jury/Witness Duty

No employee who has given reasonable prior notice may be discharged for taking time off to serve on a jury or appear in court as a witness. Cal. Labor Code §230.

B. Voting

An employee can take up to two hours of time off with pay when voting in a statewide election. Cal. Elections Code §14000.

C. Family/Medical Leave

1. California Family Rights Act

California provides for family care leave under the California Family Rights Act (“CFRA”). Cal. Gov’t Code §12945.2. CFRA leave is similar to leave under the federal Family and Medical Leave Act (“FMLA”). However, as is the case with many California laws, CFRA leave expands the protections provided in FMLA to include, for example, time off to care for the employee’s domestic partner and children or parents of the employee’s domestic partner. See Cal. Family Code §297.5.

CFRA provides unpaid, job protected time off for an employee working for an employer of at least 50 employees within a 75 mile radius if the employee has worked for at least one year and at least 1250 hours. Cal Code Regs titl 2 §11087(e). The employee is entitled to twelve (12) weeks that may be taken intermittently, all at once or in blocks of time.

CFRA leave is job protected. That means that at the conclusion of the leave, an employee will be reinstated into his/her same job or a comparable job notwithstanding layoffs, etc. Cal Regs tit. 2 §11089. And although CFRA is not paid, you may be entitled to vacation time, paid leave or Paid Family Leave. Cal. Code Regs. tit. 2, §11092(b).

2. Paid Family Leave – NOT ACTUALLY LEAVE

Paid Family Leave (“PFL”) provides benefits to individuals who need to take time off work to care for a seriously ill child, parent, parent-in-law, grandparent, grandchild, sibling, spouse, or registered domestic partner. Benefits are also available to new parents who need time to bond with a new child entering their life either by birth, adoption, or foster care placement.

PFL payment are provided through the California State Disability Insurance program, which is funded by payroll deductions. PFL is a compensation scheme (wage replacement) not leave and not a job protection. Thus, unless the employee has leave protections under the FMLA or the CFRA, there is no requirement to hold the job.

3. California Mandatory Paid Sick Leave

California enacted the Healthy Workplace Healthy Family Act of 2014 (AB1522), which became effective January 1, 2015. The Act provides that all employees who, on or after July 1, 2015, work in California for 30 or more days within a year from the beginning of employment, are entitled to paid sick leave. Employees, including part-time and temporary employees, will earn at least one (1) hour of paid leave for every 30 hours worked. The right to accrue and take sick leave begins on the first day of employment. The employee must also satisfy a 90 day employment period before the employee can actually take any sick leave.

Employees covered by a qualifying collective bargaining agreement, In-Home Supportive Services provides, and certain employees of air carriers are not covered by this law, if they receive compensated time off at least equivalent to the requirements of the new law.

Employees may use the paid leave for themselves or a family member for preventive care or care of an existing health condition or for specified purposes if the employee is a victim of domestic violence, sexual assault or stalking. Family members include the employee's parent, child, spouse, registered domestic partner, grandparent, grandchild, and sibling. Preventive care would include annual physicals or flu shots. For partial days, the employer can require the employee to take at least two (2) hours of leave. Otherwise, the determination of how much time is needed is left to the employee's discretion.

While full time employees will generally earn slightly more than eight (8) days a year, employers can limit the amount of paid sick leave the employee can take in one year to 24 hours or three (3) days. The employer can also cap the amount of sick leave an employee may accrue to six (6) days or 48 hours.

Employers must show on the employee's pay stub, or a document issued the same day as the paycheck, the amount of sick leave the employee has available. Employers must also keep records documenting the number of hours the employees earn and use for three (3) years.

If an employer has a paid time off policy that already provides employees with an amount of paid leave that meets the requirements of this law, the employer is not required to provide additional sick leave.

Sick leave does not vest and does not need to be paid out upon the employee's termination unless the employer's policy provides for a payout. However, if the employee leaves the employment and is rehired by the same employer within 12 months, the employee can reclaim what was remaining in the sick leave bank.

NOTE – Many California cities have instituted their own versions of Paid Sick Leave that differ from the California requirements. This includes San Francisco and Los Angeles.

4. Leave for Child's Suspension from School

An employee who is a parent or guardian of a child suspended from school is entitled to take time off to attend a portion of the school day in his or her child or ward's classroom, if the school has asked the employee to do so and if the employee gives the employer reasonable advance notice. Cal Labor Code §230.7.

D. Pregnancy/Maternity/Paternity Leave

Unlike the FMLA, leave taken for disability because of pregnancy, child birth, or related medical conditions is excluded from the CFRA's definition of leave because of the employee's own serious health condition. Whenever an employee takes time off related to a pregnancy, the employer must consider not only family leave, but also California's Pregnancy Disability Leave ("PDL") laws. A female employee in California is guaranteed up to four (4) months of PDL leave in addition to 12 weeks of family care and medical leave under the FMLA or CFRA. PDL leave is available to all employees of an employer with five (5) or more employees who are disabled by pregnancy, childbirth or a related medical condition. Cal Gov't Code §12945. There is no length of service requirement before an employee affected by pregnancy is eligible for pregnancy disability leave.

An employer is normally only required to provide only six (6) weeks of protected leave to a female employee for a normal pregnancy, childbirth, or related medical condition. If the employee's healthcare provider finds that the pregnancy, childbirth, or related medical condition involves a high risk or complication, then the condition is deemed to be "not normal." For example, if a woman suffers from severe morning sickness or needs to take time off for prenatal care, she may be considered disabled by pregnancy and the disability period may begin to run early in the pregnancy. A woman is considered disabled by pregnancy, childbirth or related medical conditions if a healthcare provider considers that she is unable to work at all because of the pregnancy, childbirth or related medical condition, or is unable to perform any one or more of the essential functions of her job without undue risk to herself or her unborn child. 2 Cal Code Regs. §7291.2(g).

A pregnancy disability leave may be taken intermittently or on a reduced work schedule when medically advisable. An employer may limit leave increments to the shortest period of time that the employer's payroll service uses to account for absences or use of leave.

Four (4) months weeks is the maximum period of leave that is required for any pregnancy-related disability under the PDL. A woman who is physically and mentally capable of returning to work before the expiration of four (4)

months is not entitled to a full four month leave of absence. The disability period is defined by the actual disability on which the claim is premised.

PDL is not subject to an “annual limit.” Thus, if a female employee miscarried and became pregnant again later that year, the employee’s right to take up to four (4) months off under PDL would not be reduced by the amount of PDL leave used during the first pregnancy.

E. Military Leave

California law provides that all employers shall grant temporary military leave to qualifying employees to serve in the uniformed services. Cal. Mil. & Vet. Code, §394 *et seq*. Private employers shall provide up to 17 unpaid days annually and public employers shall give up to 180 unpaid days in a year. Leave shall be available to any officer, warrant officer, or enlisted member of the military or naval forces of the state or the United States. The leave law also prohibits discrimination against any serviceperson because of his/her military service.

F. Domestic Violence, Sexual Assault, or Stalking Leave

Employers with 25 or more employees now have an affirmative duty to inform their employees of their right to take time off for domestic violence, sexual assault, or stalking. Cal Labor Code §230.1 (h)(1). Employers must provide this information to new hires upon hire, and to other employees upon request. *Id*.

6. Is there a state law governing drug-testing?

California does not have a statute governing drug testing in the employment arena. Instead, drug testing, if challenged, buts up against an individual's right to privacy included in the California state constitution. At the foundation is the understanding that all employees and potential employees have a legal right to keep their own personal lives private from their employers.

That being said, there are certainly situations in which employers can conduct drug tests. Generally, drug testing is less likely to be challenged as invading an employee’s right to privacy where they are done at the same time for every employee, if a particular employee has given the employer solid reason to believe a drug test is necessary (“reasonable suspicion”) or if the company has a written drug testing policy specifying drug testing information.

Although you may be able to lessen the likelihood requiring drug testing will be challenged, challenges that the drug testing is in some way discriminatory are very common.

7. Is there a medical marijuana statute?

California law regulating marijuana use was substantially revised in 2017 by the Medicinal and Adult Use Cannabis Regulation and Safety Act, which establishes a licensing system for medical and adult use of cannabis. See CA Bus. & Prof. Code Section 26000 et seq. In addition, California voters passed the Control, Regulate and Tax Adult Use of Marijuana Act, also known as Prop 64. This law decriminalized personal possession and use of marijuana by adults 21 years of age and older. See CA Health and Safety Code Section 11362.1(c).

Despite both medical and non-medical use of marijuana now being legal under California state law, employers in California are expressly permitted “to enact and enforce workplace policies pertaining to marijuana.” In other words, employers are not require to permit employees to possess or use otherwise “lawful” marijuana in the workplace or during working hours. Employers may also test for marijuana during lawful employee drug testing.

However, California employers do have to mindful of responding to employee marijuana use or possession on their own off duty time. The reason for this is that California has expressly codified employee rights to engage in lawful off-duty conduct in Labor Code Section 96(k) and specified that employees may not be forced to lose wages (through demotion, suspension or termination) “for lawful conduct occurring during nonworking hours away from the employer’s premises.” While this statute is rarely litigated in court, employers are advised to proceed with caution before over-reacting to employee personal off-duty use of marijuana for any purpose.

8. Is there trade secret / confidential information protection for employers?

California enacted its version of the Uniform Trade Secrets Act (UTSA) in 1984. See CA Civil Code Section 3426 et seq. The UTSA defines trade secrets as:

[I]nformation, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) Is the subject of efforts that are reasonable under the circumstances

to maintain its secrecy.

Employers are not only permitted but encouraged to take all "reasonable" efforts to discern and protect trade secrets from disclosure as that is part of the very definition of whether information is indeed a trade secret. Reasonable efforts would include confidentiality policy and agreements with employees and non-employees with access, access restriction only to those with a need to know, password protection, and training in protecting trade secrets. Reasonable efforts would also include policing the potential disclosure and violation of their trade secret agreements. Employers should not engage in intimidation and litigation tactics simply for the purpose of having a chilling effect as this could be quite counter-productive. Deciding to pursue a trade secret misappropriation case against an employee not only requires the provisional disclosure of the trade secret for litigation pleading purposes, but can also expose the employer plaintiff to the defendant employee's attorney's fees and costs under Civil Code Section 3426.4 for a "bad faith" claim. Although the statute does not define "bad faith," courts have developed a two-prong test for it: (1) objective speciousness of the claim, and (2) subjective bad faith in bringing or maintaining the action, i.e., an improper purpose. (*Gemini Aluminum Corp. v. California Custom Shapes, Inc*. (2002) 95 Cal.App.4th 1249, 1262). "Objective speciousness" can be established by evidence that the employer had an anticompetitive motive in filing the lawsuit. See, FLIR Systems, Inc. v. Parrish (2009) 172 Cal. App. 4th 1270, 1276). "Subjective bad faith" may be inferred by evidence that the employer intended to cause unnecessary delay, filed the action to harass the employee, or harbored an improper motive." *Gemini*, 95 Cal. App. 4th at 1262.

In the *Gemini* case, the court stated that the "Legislature was concerned with curbing 'specious' actions for misappropriation of trade secrets, and such actions may superficially appear to have merit." For this reason, "'bad faith' for purposes of section 3426.4 requires objective speciousness of the plaintiff's claim, as opposed to frivolousness, and its subjective bad faith in bringing or maintaining the claim." Id. A trial court's determination of "bad faith" will only be reversed on appeal for an abuse of discretion, the highest standard for appellate review.

Employers are permitted to protect their trade secrets and prohibit their disclosure or their use to engage in unfair competition, including expressly prohibiting their use for the purpose of soliciting clients or other employees. However, California employers may not simply prohibit all post-employment competition simply because an employee had access to trade secrets or confidential information.

Unlike the federal courts, California state courts do not recognize the doctrine of "inevitable disclosure" and focus on enforcing the law and public policy of the CA Business & Professions Code Section 16600, which states that, except in very limited circumstances, "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." While many California employers used to attempt an end-run around this statute by invoking other states' choice of law and venue provisions in their employee agreements, that ability has been severely curtailed as well. As of January 1, 2017, California employers are prohibited from using contract provisions that apply another state's law or require adjudication of disputes in another state. See, CA Labor Code Section 925.

Confidential information that does not rise to the definition of "trade secret" is not subject to statutory protection. However, it may be subject to carefully crafted policies while permit employers to discipline or terminate employees for disclosure or misuse of confidential information. Similarly, properly crafted confidentiality agreements may be enforced through breach of contract and injunctive relief actions in the post-employment context. If those agreements do not have prevailing party attorney fees, then they can be used in some ways with less risk to the employer than the trade secret misappropriation proceeding.

9. Is there any law related to employee's privacy rights?

California's Constitution states, at Article 1, Section 1, that all citizens of California have the inalienable right to privacy. The requirement to afford this right applies to employers. To present a violation of a constitutional right to privacy, a California employee must establish (1) a legally valid privacy interest, (2) reasonable privacy expectation under the specific circumstance, and (3) the employer's conduct that invaded that seriously invaded that privacy right.

The California Privacy Clause has been interpreted to "[p]rotect against the unwarranted, compelled disclosure of various private or sensitive information regarding one's personal life, including his or her financial affairs, political affiliations, medical history, sexual relationships, and confidential personnel information." Tien v. Superior Court, 139 Cal. App 4th 528, 539 (2006). Violation of such privacy rights gives right to tort remedies. See, e.g., Hill v. National Collegiate Athletic Ass'n, 7 Cal. 4th 1 (1994).

In addition to the general privacy rights established by the California Constitution, California employees also have

statute-specific privacy rights:

i. Video Monitoring

Video surveillance of public places in the work areas is generally permitted. Employers may also undertake video surveillance of specific employees to conduct a targeted investigation of violation of the law or workplace policies if there is reasonable suspicion to do so.

Video surveillance of private spaces in the workplace such as restrooms, locker rooms, changing rooms and similar locations is strictly prohibited without a court order. CA Labor Code Section 435.

Because any surveillance could theoretically be argued as an unforeseen violation of privacy rights, the best course for an employer is to declare the monitoring in written employment policies to affirm that employees should have not have expectation of privacy in certain locations. This is key in defeating the second prong (reasonable expectation of privacy) under the California Constitution.

ii. Tape Recording

Generally speaking, California law prohibits any tape recording of or eavesdropping on another person by means of a device without that person's express consent. If there are multiple people to a recorded conversation, each person must consent. CA Penal Code Section 632.

In the employment context, however, such consent can be lawfully obtained through advance notice of monitoring or recording of conversations of those employees who deal with the public. Employees consent to such recording and monitoring by accepting clearly spelled job offers and by accepting disclosed company practices in the handbooks or equivalent policy documents.

Violation of this Penal Code provision exposes perpetrators to fines of up to $2500 per violation and/or imprisonment of up to one year. For private causes of action, the plaintiff need not suffer damages and still recover a $5000 penalty for each violation. CA Penal Code Section 632.7.

iii. Medical Information

California employers are subject to the California Confidentiality of Medical Information Act, which strictly regulates an employer's use and disclosure of employee medical information. Employers should store such information separately from the regular personnel file and should implement specific procedures for ensuring the confidentiality and non-disclosure of medical information. CA Civil Code Section 56.20(a). Violation of the statute exposes employers to statutory damages of $1000 and/or actual damages. Best practices, therefore, require that all such files be under physical or digital "lock and key" and very limited other employees are afforded access to them without a verified need to know.

iv. Social Security Numbers

California employers may not post or display an employee's Social Security number in any manner unless state or federal law expressly requires the use of the complete Social Security number on the document. CA Civil Code Section 1798.85 et seq. Specifically, that means employers should not allow Social Security numbers to be on wage statements, to be the password for any protected access point, or to be part of any employee identification card. However, Social Security numbers may be used for internal verification and administrative purposes, such as obtaining an authorized background search. CA Civil Code Section 1798.85(b)-(c).

b. Social Media

Because California employers are bound by both generally-applicable federal law, such as the National Labor Relations Act (NLRA), as well as specific state law, there is a lot of confusion as to whether California employers have any rights to respond to whatever employees post on their social media. Generally speaking, the NLRA protects both unionized and non-unionized employees who complain or share information about their working conditions. Under most circumstances, an employer may not do anything to curtail or penalize that type of expression.

It should be no surprise that California law actually expands on the federal protections with a set of very specific laws that restrict an employer's ability to either discover or to penalize or curtail employee speech:

> Labor Code Section 980 states that employers cannot, under most circumstances, request or require an employee to disclose their social media activities or passwords or to access their social media accounts in the employer's viewing presence.
>
> Labor Code Section 232 states that employers cannot prohibit employees from discussing their wages, publicly or

privately.

Labor Code Section 232.5 states that employers cannot prohibit employees from discussing their working conditions, publicly or privately.

Labor Code Section 1101 states that employers cannot prevent employees from engaging in political activities of their choice.

Labor Code Section 96(k) states, most comprehensively, that employers cannot refuse to hire or discipline an employee for engaging in lawful off-duty conduct aware from the employer's premises.

An employer can discover and curtail employees' speech in social media under very limited and very specific circumstances. One obvious way in which personal posting to social media can lead to employee discipline is if it takes place during work hours. Employees who are on-the-clock can be prevented from engaging in any personal non-work-related activities and social media posting can certainly fall into that general category. Another obvious way in which an employee can get in trouble for personal postings even on private time is if, contrary to the general protections of Labor Code Section 96(k), the postings are not lawful. Unlawful postings can be anything from defamation of co-workers or clients to threats of violence to unauthorized disclosure of the employer's or its clients' confidential information or trade secrets. The fact that such conduct took place off-duty will not insulate an employee against its essential unlawfulness. Similarly, employees' use of social media to engage in unlawful gambling, sex trafficking or drug sales is equally fair game for discipline and termination.

Employees are often surprised when they get disciplined or even terminated for lawful but unprotected speech. Examples of such social media posts would be private rants that are racist, sexist or otherwise bigoted about other employees. Such speech is almost always in violation of an employer's harassment prevention policies, whether uttered in the workplace or not. If the employer learned of the speech in a way that did not violate the employee's privacy rights, then the employer can likely deal with it as any other employee misconduct.

It is less clear, however, whether an employer can discipline an employee for such hateful speech if it is not directed toward a co-worker or anyone specific. It is probably lawful, and conduct that is lawful and off-duty is technically protected by Labor Code Section 96(k), as hateful as it is.

c. Polygraph Tests

California employers may not require applicants or employees to take a polygraph, lie detector or similar tests as a condition of employment. CA Labor Code Section 432.2(a). Even if any employee volunteers to take such a test, the employer must provide the employee with a pre-testing notice about his rights, including the right not to take the test. The notice must explain how the testing device works; how the testing results can be used; and the individual's rights under the law, including the right to refuse to take the test and not be punished for doing so, the right to stop the test at any time, and the right to be asked questions in a way that is not degrading or unnecessarily intrusive. Id. at 432.2(b). A violation of this statute is considered a criminal misdemeanor. CA Labor Code Section 433.

10. Is there any law restricting arbitration in the employment context?

Code of Civil Procedure § 1281.2 provides that on petition of a party to an arbitration agreement alleging a written agreement to arbitrate and alleging that the other party refuses to arbitrate, the court *shall* order the parties to arbitrate. California law embodies a strong public policy in favor of arbitration. The California Supreme Court has explained the public policy behind the Code of Civil Procedure provisions relating to arbitration and the importance of enforcing arbitration agreements:

> Title 9 of the Code of Civil Procedure, as enacted and periodically amended by the Legislature, represents a comprehensive statutory scheme regulating private arbitration in this state. (§ 1280, *et seq*.) Through this detailed statutory scheme, the Legislature has expressed a '*strong public policy* in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution. Consequently, courts *will indulge every intendment to give effect to such proceedings*.

Moncharsh v. Heily & Blase, 3 Cal. 4th 1, 9 (1992) (emphasis added) (citations omitted).

> "General principles of contract law determine whether the parties have entered a binding agreement to arbitrate. This means that a party's acceptance of an agreement to arbitrate may be express . . or implied in fact where . . . the employee's continued employment constitutes her acceptance of an agreement proposed by her employer." (*Craig v. Brown & Root, Inc.* (2000) 84 Cal.App.4th 416, 420.) Indeed, because California has such a strong public policy in favor of arbitration, "arbitration agreements should be liberally interpreted, and arbitration should be ordered unless the agreement clearly does not apply to the dispute in question." *Vianna v. Doctors' Management Co.*, 27 Cal. App. 4th 1186, 1189 (1994). "Doubts as to whether an arbitration clause applies to a particular dispute are to be resolved in favor of sending the parties to arbitration." *Id*.

The Supreme Court of California has made clear the requirements of an arbitration clause in an employment agreement in order to be enforceable. Specifically, the arbitration clause must provide for (1) neutrality of the arbitrator; (2) adequate discovery; (3) provide for all types of relief that are otherwise available in court; (4) a written decision that will permit a limited form of judicial review; and (5) limitations on the cost of the arbitration. *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83, 97 (2000).

Because of the overwhelming public policy favoring arbitration, to defeat a seemingly valid agreement to arbitrate, the party opposing arbitration bears the burden of proving both substantive *and* procedural unconscionability of the arbitration agreement. *Kinney v. United Healthcare Serv., Inc.*, 70 Cal. App. 4th 1322, 1328 (1999). Substantive unconscionability focuses on whether the arbitration procedure to be utilized is "so harsh and oppressive that [the agreement] should not be enforced." *Mission Viejo Emergency Med. Assocs. v. Beta Healthcare Grp.*, 197 Cal. App. 4th 1146, 1158 (2011). The procedural component of unconscionability focuses on "the manner in which the contract was negotiated and the circumstances of the parties at that time," such as factors of surprise and oppression. *Id*., see also, *Little v. Auto Stiegler, Inc.*, 29 Cal. 4th 1064, 1072 (2003). Surprise involves the extent to which the supposedly agreed-on term is hidden in a prolix preprinted form drafted by the party seeking to enforce the disputed term. *Bruni v. Didion*, 160 Cal. App. 4th 1272, 1288 (2008). Oppression results when there is no real negotiation of contract terms because of unequal bargaining power. *Id.*

Furthermore, *even if* provisions in the parties' arbitration agreement are found to be unconscionable, either procedurally or substantively, because there is a strong public policy in favor of enforceability, courts routinely sever out illegal provisions not central to the purpose of the agreement. *Kyocera Corp. v. Prudential-Bache Trade Serv., Inc.*, 341 F. 3d 987, 1001 (9th Cir. 2003) (provision unlawfully expanding scope of judicial review of arbitration award was severable); *Abramson v. Juniper Networks, Inc.*, 115 Cal. App. 4th 638, 658-59 (2004); *McManus v. CIBC World Markets, Inc.*, 109 Cal. App. 4th 76, 101-02 (2003) (an unconscionable cost-splitting provision requiring the employee to pay costs it would not have to pay in court may be severed and the balance of the arbitration agreement enforced).

However, despite the strong public policy in favor of arbitration agreements, California employers have dealt with much uncertainty regarding the possible invalidity of their employee arbitration agreements. For example, there is uncertainty as to whether a mandatory arbitration agreement can be implemented with existing (as opposed to newly hired) employees unless new consideration is made for that arbitration agreement.

There is also uncertainty, despite the recent US Supreme Court Ruling in *Epic Systems Corp. v. Lewis*, as to whether a class action waiver in an employment arbitration agreement will be enforced. California courts have been getting around the clear federal law by finding that the arbitration agreement is not subject to the Federal Arbitration Act. See, e.g., *Muro v. Concernstone Staffing Solutions, Inc*. (February 23, 2018, D070206). In such cases, the California courts apply the analysis from *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007). Under *Gentry*, a party opposing enforcement of a class action waiver cause like the one contained in Moro's employment contract must make a factual showing under a four-factor test that requires the trial court to consider: (1) "the modest size of the potential individual recovery"; (2) "the potential for retaliation against members of the class"; (3) "the fact that absent members of the class may be ill informed about their rights"; and (4) "other real world obstacles to the vindication of class members' rights . . . through individual arbitration."

Finally, there is uncertainty as to whether an arbitration agreement may require a California employee to waive rights to present a representative action under the California Private Attorney General Statute. This uncertainty is caused by a split in authority between the California state courts and the jurisdictional federal courts that sit in and apply California substantive law. See, e.g., Iskanian v. CLS Transportation Los Angeles, LLC, 59 Cal. 4th 348 (2014), and Sakkab v. Luxottica Retail North America, Inc., 803 F. 3d 425, 439 (9th Cir. 2015).

11. Is there any law governing weapons in the employment context?

California Penal Code Section 26035 states that any person engaged in lawful business (including nonprofit organizations) or any officer, employee or agent authorized for lawful purposes connected with the business may have a loaded firearm within the place of business if that person is over 18 years of age and not otherwise prohibited from possessing firearms. However, while many states have so-called "guns at work" laws that require employers to permit their employees to leave guns in their locked vehicles in the company parking lots, California does not have such a law. That means private California employers may, and probably should, ban possession of guns and other weapons both in the workplace and in the company's parking lot.

Indeed, because employers may be held responsible under tort law and under worker's compensation laws for failure to take reasonable steps to prevent workplace violence, best practices require employers to have and to enforce a comprehensive policy prohibiting workplace violence, threats of violence, and possession of weapons of violence in the workplace and during working hours. Cal/OSHA also requires that all California employers have and enforce an Injury and Illness Prevention Program (IIPP) to uncover and reduce preventable incidents of injury in the workplace. See, 8 CCR Section 3203; see also eTool for creating an IIPP at https://www.dir.ca.gov/dosh/etools/09-031/what.htm . In addition, Cal/OSHA expressly requires

employers to record on their logs all fatalities and serious injuries that occur as a result of workplace violence. See, CA 8 CCR Sections 14300-14400.

In addition to it being a best practice, a workplace violence prevention policy is mandatory in some industries in California. For example, hospitals, hospices, home health care facilities and other health care providers must:

Adopt violence prevention plans in coordination with their employee;
Train personnel on how to recognize and respond to violence, and resources available to employees who are victims of violence;

Develop a plan for how to respond to, and investigate violence incidents;

Assess factors that contribute to violence in the hospital, including sufficiency staffing, security, access, and lighting;

Document training records;

Document and track "violent incident" logs and report incidents of violence to Cal/OSHA; and

Depending on the specifics, report any incident involving firearms or other dangerous weapons within 24 or 72 hours.

See, CA 8 CCR Section 3342

One of the ways employers may enforce their violence prevention policies is through comprehensive workplace search policies. Because of California employee privacy rights (see _____, above), employers may only conduct such searches with employee consent or with a clearly articulated "reasonable suspicion" that the employee is currently in violation of the company's anti-weapons policy.

12. Miscellaneous employment or labor laws not discussed above?

- Labor Code Section 1102.5 – 1105 (Whistleblower)
- *Cotran* case as standard for workplace investigations
- Labor Code Section 970 (Fraudulent hiring that results in employee relocation)
- Labor Code Section 203.1 (30 Day Waiting Time Penalty for Bounced Checks): Employers who pay with checks returned for insufficient funds are subject to a maximum 30-day penalty. The penalty is set at the rate of pay the worker was receiving when the check bounced. The penalty is excused if the employer can demonstrate that the violation was unintentional.
- Labor Code Section 213(d) (Bank Account Deposit of Wages): Employers may pay wages by direct deposit only if voluntarily authorized by the employee. An employer cannot require that the employee accept payment via direct deposit.
- Labor Code Section 222.5 (Employers Must Pay for Medical or Physical Examinations): Employers may not require current or prospective employees to pay for medical or physical examinations required for employment or required by federal, state or local law.
- Labor Code Section 230.3 (Serving on Emergency Duty): Employers may not discriminate against employees who take time off to perform emergency duties as a volunteer firefighter, reserve peace officer, or emergency rescue personnel.
- Labor Code Section 230.8 (School Visits Permitted): Employers who employ more than 25 or more employees at the same location may not discriminate against employees for taking off up to forty hours each year (not to exceed eight hours per month) to participate in activities at their child's K to 12th grade school or licensed child day care facility.
- Labor Code Section 432 (Employee Entitled to Copy of Documents Signed): Employee is entitled to a copy upon request of any document that he or she signs relating to obtaining or holding of employment.
- Labor Code Section 432.2 (Polygraph/Truth Tests): No employer may require an applicant or employee to submit to a polygraph or other similar test as a condition of employment. Exemption for public agencies.
- Labor Code Section 1041 (Employer Must Reasonably Accommodate Illiterate Employees): An employer employing 25 or more employees must reasonably accommodate and assist an employee who reveals a problem of illiteracy and requests employer assistant in enrolling in an adult literacy education program, provided that the accommodation does not impose an undue hardship on the employer.
- Labor Code Section 2441 (Workplace Drinking Water): Employers must provide fresh, free and pure drinking water.

COLORADO

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1. Is the state generally an employment-at-will state?

Colorado follows the legal doctrine of employment-at-will, which provides that in the absence of a contract to the contrary, neither an employer nor an employee is required to give notice or advance notice of termination or resignation. Additionally, neither an employer nor an employee is required to give a reason for the separation from employment. In Continental Airlines Inc. v. Keenan, 731 P.2d 708 (Colo. 1987), the Colorado Supreme Court recognized at-will employment in Colorado.

2. Are there any statutory exceptions to the employment-at-will doctrine?

No.

3. Are there any public policy exceptions to the employment-at-will doctrine?

Colorado courts have recognized two "wrongful discharge" exceptions to the employment at-will doctrine: [1] wrongful discharge claims alleging breach of an implied contract or based on a theory of promissory estoppel; and [2] claims for wrongful discharge in violation of public policy. Keenan, 731 P.2d at 711. Under the implied contract theory, an employee normally claims to be entitled to relief because the employer, by promulgating certain termination procedures, made an offer to the employee of continuing employment, and the employee's initial or continued employment constituted an acceptance of that offer. Alternatively, under a promissory estoppel theory, employees may be entitled to relief if they can demonstrate that [1] the employer reasonably should have expected the employee to consider the termination policy a commitment from the employer to follow the termination procedures, [2] the employee reasonably relied on the termination procedures to the employee's detriment, and [3] injustice can be avoided only by enforcement of the termination procedures. Id. Generally, Colorado's three-year statute of limitation applies to implied contract and promissory estoppel claims. C.R.S. 13-80-101.

The Colorado Supreme Court adopted the public policy exception to the at-will doctrine in Martin Marietta Corporation v. Lorenz, 823 P.2d 100, 108 (Colo. 1992). In so ruling, the Court held that an employee may be entitled to relief from a discharge if the employee can show that: [1] the employer directed the employee to perform an illegal act as part of the employee's work related duties or prohibited the employee from performing a public duty to exercise an important job related right or privilege; [2] the action directed by the employer would violate a specific statute relating to the public health, safety, or welfare, or would undermine a clearly expressed public policy relating to the employee's basic responsibility as a citizen; and [3] the employee was terminated as the result of refusing to perform the act directed by the employer. Public policy discharge claims are tort claims, subject to Colorado's two-year statute of limitations. C.R.S. § 13-80-102.

4. Is there any law related to the hiring process?

Advertising: It is unlawful to induce, influence, persuade or engage workers to change from one place to another or to bring workers to work in Colorado through means of false or deceptive representations, false advertising, or false pretenses concerning the kind and character of the work to be done, or the amount and character of the compensation to be paid, or the sanitary or other conditions of employment, or the existence or non-existence of a strike or lockout pending between the employer and employees. C.R.S. § 8-2-104. Employers must also comply with the anti-discrimination provisions of the Colorado Anti-Discrimination Act (C.R.S. § 24-34-402).

Background Checks:

(a) Effective September 1, 2019 for employers with 11 or more employees and September 1, 2021 for all employers, employers can no longer ask about a person's criminal history in an initial job application (C.R.S. § 8-2-130). Employers

are also banned from advertising or placing a statement on an application that a person with a criminal history may not apply for a position. However, employers can run a criminal background check at any time. Employers are exempt from the new guidelines if the law prohibits a person from holding a position if that person has a certain criminal background or if an employer is required by law to conduct a criminal history record check for a particular position. In pre-employment inquiries into a person's criminal background after the initial application, the Colorado Civil Rights Division states in its Pre-Employment Inquiries Guidelines that asking any questions about arrests may lead to a discriminatory inference unless such questions are substantially related to the applicant's ability to perform a specific job. Colorado employers may not inquire about sealed records (C.R.S. § 24-72-702).

(b) Medical history. The Colorado Code of Regulations prohibits pre-offer medical examinations and pre-employment inquiries as to whether an applicant is an individual with a disability (3 CCR § 708-1:60.3). However, employers may condition an offer of employment on the results of a medical examination conducted before the employee begins employment, as long as all entering employees are subject to such an exam regardless of disability and the exam results are used only in accordance with Colorado law. Id.

(c) Drug screening. Colorado does not have a state law regulating drug and alcohol testing by private employers. While Colorado has legalized the use of marijuana for both medical and recreational purposes, the Colorado Supreme Court has ruled that terminating an employee who used medical marijuana outside the workplace after he or she tested positive during a random drug test did not violate Colorado's lawful activities statute, because marijuana use remains unlawful under federal law. Coats v. Dish Network, LLC, 350 P.3d 849 (Colo. 2015).

(d) Credit checks. Colorado's Employment Opportunity Act, C.R.S. § 8-2-126, restricts the use of consumer credit information by employers. Generally, employers may not require or request a credit report as a condition of employment, unless the employer is a financial institution, the report is required by law, or the report is substantially related to the employee's current or potential job and is disclosed in writing to the employee.

Other: The Colorado Antidiscrimination Act prohibits all public and private employers from discriminating in their hiring practices on the basis of race, creed, color, sex (including sexual harassment), sexual orientation (including transgender status), religion, national origin, ancestry, age, or disability. C.R.S. § 24-34-401 et seq.

5. Does the state recognize implied employment contracts under employment handbooks, policies, or practices?

The Colorado Supreme Court first recognized the implied-contract exception to the employment-at-will doctrine in Continental Air Lines, Inc. v. Keenan, 731 P.2d 708 (Colo. 1987). The Court held that an employee manual can, under some circumstances, constitute an implied contract with an at-will employee. Specifically, the court held that an at-will employee bringing a wrongful-discharge action can enforce termination procedures in an employee manual by demonstrating that the employer's promulgation of the procedures was an offer, and that the employee's continued employment constituted acceptance of and consideration for those procedures.

Colorado courts have since refined and broadened the implied-contract exception recognized by the court in Keenan. The implied-contract exception has been held to apply not only to termination procedures in employee manuals and handbooks, but also to other policies and procedures in employee handbooks and manuals, to internal documents other than employee manuals and handbooks, to pre-employment offer letters, and to oral statements made by the employer during the employment period. For example, one court has held that the implied-contract exception applies to the causes or reasons for discharge as well as the procedures for discharge. DeRubis v. Broadmoor Hotel, Inc., 772 P.2d 681, 682 (Colo. App. 1989). In DeRubis, the court held that an at-will employee may bring an action for wrongful discharge based on a grievance procedure, classification for probationary and regular employees, and specification of causes for termination contained in an employee manual. Id. Thus, an at-will employee may bring an action for wrongful discharge based on an employee manual even if it does not contain termination procedures.

Courts also have found that the implied-contract exception applies to statements in an employee handbook promising that the employer will not discriminate on the basis of race, sex, religion, or national origin. *Tuttle v. ANR Freight Sys., Inc.*, 797 P.2d 825, 827-28 (Colo. App. 1990). The courts are split on whether statements in employee handbooks and manuals that vest discretion in employers can constitute an implied contract. Compare *Jaynes v. Centura Health Corp.,* 148 P.3d 241, 249 (Colo. App. 2006) (personnel policy that set forth "guidelines" that "normally" are to be used in dealing with unacceptable employee conduct did not create an implied contract), with *Gomez v. Martin Marietta Corp*., 50 F.3d 1511, 1516 (10th Cir. 1995) (progressive discipline policy that was not mandated in all cases nevertheless could constitute implied contract to apply progressive discipline).

The implied-contract exception may apply not only to statements in employee handbooks or manuals, but also to nearly any

document containing statements by the employer. For example, the court in *Allabashi v. Lincoln National Sales Corporation* found an implied contract based on termination procedures and policies in documents other than the employee handbook, despite the existence of a disclaimer in the employee handbook. 824 P.2d 1, 3 (Colo. App. 1991). The implied-contract exception also has been extended to statements in pre-employment offer letters. See *Dorman v. Petrol Aspen, Inc.,* 914 P.2d 909 (Colo. 1996). The implied-contract exception has been extended not only to written statements by the employer, but also to oral statements. See *Giannola v. Aspen/Pitkin Cnty. Hous. Auth.,* 165 F. App'x 661, 665 (10th Cir. Feb. 7, 2006) (unpublished opinion); *Chidester v. Eastern Gas & Fuel Assoc.,* 859 P.2d 222, 225 (Colo. App. 1992). Finally, no implied contract can exist where there is an express contract covering the same subject matter. *Holland v. Bd. of County Comm'rs,* 883 P.2d 500, 506 (Colo. App. 1994). The provisions of the express contract, in such a case, supersede those of the implied contract. Id.

6. Does the state have a right to work law or other labor / management laws?

Colorado does not have a right to work law, at least one that is similar to those of other states. However, Colorado has a kind of hybrid policy under its Labor Peace Act. See C.R.S. § 8-3-101 et seq. Under the Act, employees at most workplaces are not required to join a union or pay dues, even though they enjoy the same compensation and benefits as union members. By not joining the union, however, workers are not covered by union protections (including legal representation in employment disputes). But Colorado also allows workers to override right to work provisions by becoming an "all-union" shop. This is achieved by a 75 percent approval vote by employees, a process that is overseen by the Colorado Department of Labor and Employment.

7. What tort claims are recognized in the employment context?

Wrongful Termination Against Public Policy: See supra Section 2.

Tortious Interference with Contract Claims: To state such a claim, an employee must prove that [1] a valid contract existed between the employee and his or her employer; [2] the supervisor knew or should have known of this contract; [3] the supervisor intended to induce and caused a breach of the contract by the employer; and [4] the employee was damaged as a result. *Trimble v. City and Cnty. of Denver*, 697 P.2d 716, 725-26 (Colo. 1985). Unless otherwise indicated, all tort claims asserted under Colorado law have a two year statute of limitation. C.R.S. § 13-80-102.

Defamation: Defamation is a common law tort based on the alleged publication of false or derogatory statements about a person. If an employer makes a false statement of fact about an employee, which tends to injure the employee's reputation, and that statement is published to a third person, the employee may state a claim for defamation. False statements about a person's ability to perform his or her jobs are per se defamatory, which means that damages are presumed. Libel pertains to written statements, *Cont'l Cas. Co. v. Sw. Bell Tel. Co*., 860 F.2d 970, 976 (10th Cir. 1988), and slander, to oral statements. *Pittman v. Larson Distrib. Co*., 724 P.2d 1379, 1387 (Colo. App. 1986). A claim for defamation has a one-year statute of limitation. C.R.S. § 13-80-103.

Invasion of Privacy: In *Ozer v. Borquez,* the Colorado Supreme Court recognized a claim for invasion of privacy based on unreasonable publicity concerning an employee's private life. 940 P.2d 371, 377. To prevail on such a claim, a party must meet the following requirements: [1] the fact or facts disclosed must be private in nature; [2] the disclosure must be to the public; [3] the disclosure must be one which would be highly offensive; [4] the fact or facts disclosed cannot be of legitimate concern to the public; and [5] the party who made the disclosure acted with reckless disregard of the private nature of the fact or facts. Id. A claim for invasion of privacy has a two year statute of limitation. C.R.S. § 13-80-102.

Intentional Infliction of Emotional Distress: To establish a claim for the tort of intentional infliction of emotional distress under Colorado law, an employee must allege conduct that is so "outrageous in character, and so extreme in degree, as to be beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Pearson v. Koncilia,* 70 P.3d 594, 597 (Colo. App. 2003). The elements of a claim for outrageous conduct are: [1] defendant's extreme and outrageous conduct; [2] defendant's reckless or intent of causing severe emotional distress; and [3] severe emotional distress to the plaintiff caused by the defendant's conduct. Id.

Generally, courts in Colorado have refused to find that ordinary, adverse employment actions constitute outrageous conduct. See *Covert v. Allen Grp., Inc.,* 597 F. Supp. 1268, 1270 (D. Colo. 1984) (no outrageous conduct for refusing to honor promise to employees); *Salimi v. Farmers Ins. Grp.*, 684 P.2d 264, 265 (Colo. App. 1994) (demotion in violation of policy and procedural manual not outrageous conduct); *Gelman v. Dep't of Educ.,* 544 F. Supp. 651, 653 (D. Colo. 1982) (breach of contract and disability discrimination not outrageous conduct). Mere insults, threats, and annoyances are insufficient to state a claim for outrageous conduct. Pearson, 70 P.3d at 597.

Misrepresentation: Although unsettled, it appears that claims for negligent misrepresentation are governed by the three-year statute of limitations rather than the two-year statute addressing negligence claims. Colorado courts do not recognize an independent tort action for negligent or intentional misrepresentation based on alleged employment contract obligations. See, e.g., *Centennial Square, Ltd. v. Resolution Trust Co.*, 815 P.2d 1002, 1004 (Colo. App. 1991); *Bloomfield Fin. Corp. v. Nat'l Home Life Assurance Co.*, 734 F.2d 1408, 1414-15 (10th Cir. 1984). Nonetheless, statements made by an employer, particularly in the pre-hire situation where an employee is induced to accept a new job, may provide the basis for tort, contract or statutory types of claims. See, e.g., *Berger v. Sec. Pac. Info. Sys.,* 795 P.2d 1380, 1384 (Colo. App. 1990) (employer's failure to disclose known risk that job would soon be discontinued supported claim for fraudulent concealment); *Nelson v. Gas Research Inst.,* 121 P.3d 340 (Colo. App. 2005) (finding that plaintiff failed to show justifiable reliance on representations that induced him to move to Colorado).

In the employment context, fraud and negligent misrepresentation claims against an employer often appear in the same complaint. While these claims share similar elements, there is one very important difference. The claim of fraud requires "scienter," or the "defendant's conscious knowledge of the falsity of the representation or such recklessness as amounts to a conscious indifference to the truth." *Ebrahimi v. E.F. Hutton & Co., Inc.*, 794 P.2d 1015, 1017 (Colo. App. 1989). In a negligent misrepresentation claim, the defendant's state of mind is irrelevant except where it must be shown that the defendant failed to act reasonably in ascertaining the accuracy of the information supplied or in communicating that information. The defendant may have had good intentions, but simply failed to exercise reasonable care. *Id.*

Negligent Hire: "The tort of negligent hire is based on the principle that [an employer] conducting an activity through employees is subject to liability for harm resulting from negligent conduct 'in the employment of improper persons or instrumentalities in work involving risk of harm to others.'" *Connes v. Molalla Transp. Sys., Inc.*, 831 P.2d 1316, 1320 (Colo. 1992) (quoting *Restatement (Second) of Agency* § 213(b) (1958)). The tort of negligent hiring, when applicable under the circumstances of a particular case, can operate to hold an employer liable for intentional or negligent acts of an employee that are within or outside of the scope of employment. Cf. *Raleigh v. Performance Plumbing & Heating,* 130 P.3d 1011, 1013 (Colo. 2006) (holding that absent other circumstances, employer's negligent hiring liability does not extend to off-duty driving).

Negligent Supervision and Retention: In contrast to negligent hiring, the torts of negligent supervision and retention arise in the continued employment of an employee. The tort of negligent supervision involves allegations that a particular employee was improperly supervised, and as a result of some conduct by the employee, another person was injured. *Restatement (Second) of Agency* § 213; see also *Restatement (Second) of Torts* § 414. An employer may be liable for negligent supervision if "he knows or should have known that an employee's conduct would subject third parties to an unreasonable risk of harm." *Moses v. Diocese of Colo.,* 863 P.2d 310, 329 (Colo. 1993) (quoting *Destefano v. Grabrian*, 763 P.2d 275, 288 (Colo. 1988)). The tort of negligent retention involves allegations that an injury occurred because an employer retained a particular employee after the employer knew or should have known that some harm may come upon a third party as a result of the actions of the employee. *Restatement (Second) of Torts* § 317. While the torts of negligent supervision and negligent retention are separate and distinct, they commonly arise from the same fact pattern and are discussed in opinions as one cause of action.

False Imprisonment: "False imprisonment is an unlawful restraint upon a person's freedom of locomotion, or the right to come and go when or where one may choose." *Blackman v. Rifkin,* 759 P.2d 54, 58 (Colo. App. 1988) (internal citation omitted). To prove a claim of false imprisonment, a plaintiff must demonstrate that: "(1) the defendant intended to restrict the plaintiff's freedom of movement; (2) the defendant, directly or indirectly, restricted the plaintiff's freedom of movement for a period of time, no matter how short; and (3) the plaintiff was aware that her freedom of movement was restricted." CJI-Civ. 21:1 (CLE ed. 2016); *Restatement (Second) of Torts* §§ 35 and 41 (1965). There are few reported cases of false imprisonment in the employment context, due in part to the exclusivity provisions of the Workers' Compensation Act. See *Ventura v. Albertson's, Inc.*, 856 P.2d 35, 39 (Colo. App. 1992). Most of the cases reported in Colorado involving the employment relationship are claims by third parties against an employer and its employees. See *Blackman*, 759 P.2d at 58. A claim for false imprisonment has a one-year statute of limitation. C.R.S. § 13-80-103.

Assault and Battery: Although claims for assault and battery commonly are pled together, they actually are distinct claims that may be raised separately. To prevail on a claim of assault, a plaintiff must prove: (1) the defendant intended to cause an offensive or harmful physical contact with the plaintiff or intended to place the plaintiff in apprehension of such contact; (2) the defendant placed the plaintiff in apprehension of immediate physical contact; and (3) the contact was or appeared to be harmful or offensive. CJI-Civ. 20:1 (CLE ed. 2016). To prevail on a claim of battery, a plaintiff must prove that: (1) the defendant intended to make harmful or offensive physical contact with the plaintiff or another, or acted with knowledge that such contact would probably result, or acted with the intent of putting the plaintiff or another in apprehension of such contact; (2) the defendant's act resulted in a bodily contact with the person of the plaintiff; and (3) such contact was harmful or offensive. CJI-Civ. 20:5 (CLE ed. 2016); *Whitley v. Andersen,* 551 P.2d 1083, 1085 (Colo. App. 1976), *aff'd,* 570 P.2d 525 (Colo. 1977); *Hall v. McBryde,* 919 P.2d 910, 913-14 (Colo. App. 1996). Claims for assault and battery have a one-year statute of limitation.

C.R.S. § 13-80-103.

The exclusivity provisions of the Colorado Workers' Compensation Act, C.R.S. §§ 8-41-101 through -505, bar tort claims, including assault and battery, that "arise out of employment." The assaults that fall within the exclusivity provision of the Workers' Compensation Act are those that are inherently connected to the employment or that are attributable to neutral sources (such as a roving lunatic or stray bullet) that are not personal to the particular employee, but which occur because of where the employee happens to be positioned. *Horodyskyj v. Karanian*, 32 P.3d 470, 476-78 (Colo. 2001). Assaults that are inherently private or that are unrelated to the employment but arguably arose because of the "friction and strain" of employment fall outside the provisions of the Act.

8. Is there a common law or statutory prohibition against discrimination / hostile work environment?

Colorado's Anti-Discrimination Act (CADA) prohibits discrimination based on protected status in the workplace, housing, and public accommodations. Categories protected include disability, race, creed, color, sex, sexual orientation, religion, age, national origin or ancestry." C.R.S. § 24-34-402(1)(a). Under CADA, it is a discriminatory or unfair employment practice for an employer to refuse to hire, to discharge, to promote or demote, to harass during the course of employment, or to discriminate in matters of compensation against any person otherwise qualified because of that individual's protected status. Employment agencies, labor unions, and a variety of other labor organizations are also prohibited from discrimination on these bases. CADA protects employees, job applicants, and members of labor organizations. Broader than federal law, CADA applies to state and local governments, employment agencies, labor unions, and virtually all employers.

This statute was amended in 2007 to add a proscription against sexual orientation discrimination and a safe harbor for religious organizations, and to eliminate the possibility of an employer attorney fee award in cases alleging violation of the lawful off-the-job activity statute. CADA was also amended in 2013 by the Job Protection and Civil Rights Enforcement Act of 2013. C.R.S. § 24-34-405. The principal aim of the amendment was to substantially strengthen the remedies available to employees who prove violations of CADA. Beginning with cases arising on or after January 1, 2015, plaintiffs pursuing claims under the CADA may recover both economic and non-economic damages from employers – including small businesses with fewer than 15 employees – who are found liable for engaging in workplace discrimination.

The Job Protection and Civil Rights Enforcement Act authorizes new penalties for violations of the CADA. If a court or the Colorado Civil Rights Commission (Commission) finds an employer has engaged in an unfair or discriminatory employment practice, the employee may be entitled to the following relief: (1) reinstatement or hiring, with or without back pay; (2) front pay; and (3) any other equitable relief that either the court or the Commission considers appropriate C.R.S. § 24-34-405(2)(a). The Act authorizes courts to award the prevailing plaintiff reasonable attorneys' fees and costs. C.R.S. § 24-34-405(4).

9. Is there a common law or statutory prohibition of retaliation?

In Colorado, most cases brought in Colorado state court for retaliation are filed under CADA. C.R.S. § 24-34-401. If the cases are brought in federal district court, the cases are brought under Title VII. .

10. Is the state a deferral state for charges filed with the EEOC?

A discrimination claim can be filed either with the state administrative agency, the Colorado Civil Rights Division (CCRD), or with the federal administrative agency, the EEOC. The two agencies have a "work-sharing agreement," which means that the agencies cooperate with each other to process claims. Filing a claim with both agencies is unnecessary, as long as the claimant indicates to one of the agencies that the charge is being cross-filed with the other agency.

11. Are there any state laws related to compensation, including wage and hour, paid time off, mandatory breaks, fringe benefits, allowable deductions, prevailing wage rates for public contracts, etc.?

The starting point for any discussion of the law of wages and benefits in Colorado is the Colorado Wage Act, C.R.S. § 8-4-101, *et seq*. The Act applies to employees while still employed, as well as after the employment relationship is terminated. The Act applies only to private sector employees and employers. Independent contractors are not covered. The Act provides for a two-year statute of limitation after the cause of action accrues. C.R.S. § 8-4-122. However, for a "willful violation" of the Act, the statute of limitations is three years after the cause of action accrues. *Id*. An employee who prevails under the Act is entitled to the amount of wages due. Reasonable attorney fees and several different penalties are also available to the prevailing party. C.R.S. § 8-4-109(3)(b).

In 2019, the Colorado legislature passed Senate Bill 19-085, the Equal Pay for Equal Work Act, which goes into effect on

January 1, 2021 (C.R.S. § 8-5-101 et seq.). The new law expands the current prohibition on wage discrimination to include discrimination based not only on sex but also on sex in combination with another protected status. The law provides that employers who conduct proactive self-evaluations of their compensation practices may use that fact to avoid an award of statutory liquidated damages equal to the amount of the employee's economic damages (i.e., double damages).

Under the new law, employers must make reasonable efforts to announce, post or make known all opportunities for promotion to all current employees on the same calendar day. In addition, employers must disclose in each posting for each job opening the hourly or salary compensation, or a range of the hourly or salary compensation, and a general description of all benefits and other compensation offered.

Finally, the law prohibits employers from (a) seeking the wage rate history of a prospective employee or relying on the wage rate history of a prospective employee to determine a wage rate and (b) discriminating or retaliating against a prospective employee for failing to disclose the prospective employee's wage rate history. Employers also may not prohibit employees from disclosing or discussing their wage rates.

12. Is there a state statue governing paid or unpaid leaves?

Paid and unpaid leave are generally governed by the employer's employment policies, the contract between the employer and employee, or by federal laws such as the ADA and FMLA. However, CADA was amended in 2016 to expand proscribed employer discrimination to include taking adverse employment action against an employee who requests or uses a reasonable accommodation for pregnancy, physical recovery from childbirth, or a related condition. C.R.S. § 24-34-402.3(1)(a)(II).

13. Is there a state law governing drug-testing?

Colorado does not have a state law regulating drug and alcohol testing by private employers. While Colorado has legalized the use of marijuana for both medical and recreational purposes, the Colorado Supreme Court ruled that terminating an employee who used medical marijuana outside the workplace after he or she tested positive during a random drug test did not violate Colorado's lawful activities statute, since the use of marijuana remains unlawful under federal law. Coats v. Dish Network, LLC, 350 P.3d 849 (Colo. 2015).

14. Is there a medical marijuana statute?

Amendment 64 to the Colorado Constitution makes the private use, and limited possession and home-growing of marijuana, legal under Colorado law for adults 21 years of age and older. The Amendment further establishes a system in which marijuana is regulated, taxed, and distributed similarly to alcohol and requires the state legislature to permit the cultivation, processing, and sale of industrial hemp. The Colorado General Assembly provides the Marijuana Enforcement Division of the Colorado Department of Regulatory Agencies with the authority to carry out its mission of regulating the cultivation and sale of marijuana. C.R.S. § 12-43.3-101 *et seq.*

15. Is there trade secret / confidential information protection for employers?

Colorado has enacted the Colorado Uniform Trade Secrets Act, but made changes in some of the provisions of the uniform trade secrets act. C.R.S. § 7-74-101 et seq. The Colorado Uniform Trade Secrets Act has a different definition of a "trade secret." Colorado enacted different provisions concerning injunctions and exemplary damages.

Under Colorado law, "trade secret" means the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, improvement, confidential business or financial information, listing of names, addresses, or telephone numbers, or other information relating to any business or profession which is secret and of value. C.R.S. § 7-74-102(4). To be a "trade secret" the owner thereof must have taken measures to prevent the secret from becoming available to persons other than those selected by the owner to have access thereto for limited purposes. Id. The Colorado Uniform Trade Secrets Act preempts other common law claims where they "are no more than a restatement of the same operative facts which would plainly and exclusively spell out only trade secret misappropriation." Finally, the Colorado Uniform Trade Secrets Act empowers courts to issue injunctions, and to award exemplary damages and attorney fees for willful and malicious misappropriation. C.R.S. §§ 7-74-103, 104, 105

16. Is there any law related to employee's privacy rights?

Colorado employees enjoy the right to privacy. Colorado first recognized the common law tort of invasion of privacy in the context of debt collection practices. *Rugg v. McCarty*, 471 P.2d 753, 755 (Colo. 1970). In *Doe v. High-Tech Institute, Inc.*, Colorado further extended the privacy right to "intrusions into a person's private concerns"— such as results of an HIV test—"based upon a reasonable expectation of privacy in that area." 972 P.2d 1060, 1068 (Colo. App. 1998). One limiting factor in proving the tort is the employee's showing a "reasonable expectation of privacy." Id. For a discussion regarding a

claim for invasion of privacy, see Section 7 .

17. Is there any law restricting arbitration in the employment context?

The statutory basis for arbitration under Colorado law is found in the Colorado Uniform Arbitration Act, C.R.S. § 13-22-201, *et seq.* (the Colorado Act). The Colorado Act makes clear that a court, and not the arbitrator, shall decide whether an agreement to arbitrate exists and whether a controversy is subject to arbitration, and the arbitrator shall decide whether a condition precedent to arbitration has been satisfied or whether the agreement containing the arbitration provision is enforceable. C.R.S. §§ 13-22-206(2) and (3); *Lane v. Urgitus,* 145 P.3d 672, 677 (Colo. 2006); cf. *Youmans v. Dist. Court,* 589 P.2d 487, 489 (Colo. 1979) (holding that, under former Colorado Act, the arbitrability of a particular question is, in the first instance, for the arbitrator to decide); *Moffet v. Life Care Centers of Am., Inc.,* 187 P.3d 1140, 1143 (Colo. App. 2008) (holding that appellate courts undertake a *de novo* review when considering a district court's order compelling arbitration). Employees may attempt to oppose the enforcement of arbitration agreements by arguing that the agreement was a contract of adhesion, unconscionable, illegal, or fraudulently induced. *Gourley v. Yellow Transp., LLC,* 178 F. Supp. 2d 1196 (D. Colo. 2001) (finding arbitration agreement illusory and therefore unenforceable); *Perez v. Hospitality Ventures-Denver LLC,* 245 F. Supp. 2d 1172 (D. Colo. 2003) (cost sharing requirement in arbitration clause held unenforceable).

To the extent that a transaction involves interstate commerce, the Federal Arbitration Act, not the Colorado Act, controls. 1745 *Wazee LLC v. Castle Builders Inc.,* 89 P.3d 422, 424-25 (Colo. App. 2003). The parties to a contract involving interstate commerce may specify that the Colorado Act applies, but a general choice of law provision will not suffice.

18. Miscellaneous employment or labor laws not discussed above?

Employment Reference. There is no requirement in Colorado for an employer to give a reference for a current or former employee to a prospective employer. If a reference is given, C.R.S. § 8-2-114 provides a means for avoiding liability. Section

8-2-114 provides that it is unlawful for any employer to maintain a blacklist, or to notify any other employer that any current or former employee has been blacklisted by such employer, for the purpose of preventing such employee from receiving employment. Nothing prevents a former employer of any such employee from imparting a fair and unbiased opinion of such employee's qualifications when solicited so to do by a later or prospective employer of such employee. In fact, any employer that, upon request by a prospective employer or a current or former employee, provides fair and unbiased information about a current or former employee's job performance, is presumed to be acting in good faith and shall be immune from civil liability for such disclosure and the consequences of such disclosure. The presumption of good faith may be rebutted upon a showing by a preponderance of the evidence that the information disclosed was knowingly false, deliberately misleading, disclosed for a malicious purpose, or violative of a civil right of the employee.

Social media: Colorado employers may not suggest, request, or require that an employee or applicant disclose any user name, password, or any other information that provides access to the individual's personal accounts or personal electronic communications devices. Employers also may not compel an employee or applicant to add anyone as a "friend" or to his or her list of contacts and may not require, request, suggest, or cause an employee or applicant to change his or her privacy settings associated with a social networking account. Finally, employers cannot discharge, discipline, or discriminate against any employee or applicant for refusing or failing to disclose such information. A few exemptions exist related to conducting workplace investigations regarding compliance with applicable laws or the unauthorized downloading of the employer's proprietary information (C.R.S. § 8-2-127).

Lawful Activities Statute: The Lawful Activities Statute, C.R.S. § 24-34-402.5, limits an employer's ability to terminate an employee for an off-duty act so long as the conduct is deemed legal. One exception to this rule is if the objectionable off duty conduct relates to a bona fide occupational requirement. In addition, the statute is not violated if termination for lawful off duty conduct is necessary to avoid a conflict of interest.

CONNECTICUT

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1. Is the state generally an employment-at-will state?

Yes, subject to statutory and common law exceptions.

2. Are there any statutory exceptions to the employment-at-will doctrine?

a. Discrimination based upon race, color, creed, age, sex, marital status, national origin, ancestry, mental disability or retardation, learning disability or physical disability. Conn. Gen. Stat § 46a-60(a)(1). Discrimination based upon sexual orientation. Conn. Gen. Stat. § 46a-81c.

b. Whistleblower protection. Conn. Gen. Stat. § 31-51m et seq.

c. Constitution rights exercise. Conn. Gen. Stat. § 31-51q.

d. Free speech exercise. Conn. Gen. Stat. § 31-51q.

3. Are there any public policy exceptions to the employment-at-will doctrine?

a. *Sheets v. Teddy's Frosted Foods, Inc.*, 427 A.2d 385 (1980).

b. Whistleblower. § 31-51m. (Requires exhaustion of administrative remedies; reinstatement, lost wages and benefits, legal fees; jury trial in action against non-governmental entities).

c. Constitutional rights. Conn. Gen. Stat. § 31-51q. (Damages, legal fees, jury trial in action against non-governmental entities)

4. Is there any law related to the hiring process?

a. **Applications.**:Discrimination in employment applications is prohibited absent occupational qualification or need. Conn. Gen. Stat. §§ 46a-60(a)(1) and 46a-81c. There is a private right of action, however employees must first file a complaint with the Connecticut Commission of Human Rights and Opportunities (CHRO). Injunctive relief, damages (actual, compensatory and punitive), jury trial and legal costs and fees are available. Conn. Gen. Stat. §§ 46a-83a, 46a-100, 46a-101 and 46a-102.

b. **Background.**:Employers cannot inquire about a prospective applicant's previous arrests, criminal charges or convictions unless required by federal law. There is no private right of action under this law, but employees may file a complaint with the Connecticut Department of Labor. Conn. Gen. Stat § 31-51i.

c. **Privacy**: An employer may not request or require applicants (or employees) to disclose log-in information for online accounts or accept employer's invitation to join group related to applicants' personal online account. There is no private right of action under this law, but employees may file a complaint with the Connecticut Department of Labor. Conn. Gen. Stat. § 31-40x(b).

d. **Credit history:** Certain employers are prohibited from requiring that an applicant (or employee) consent to employer obtaining a credit report or information concerning personal finances. There is no private right of action under this law, but employees may file a complaint with the Connecticut Department of Labor. Conn. Gen. Stat. §§ 31-51tt(b) and § 31-51tt(c).

e. **Information required at time of hiring:** Employers must provide rate of pay, hours of employment and payment.

5. Does the state recognize implied employment contracts under employment handbooks, policies, or practices?

a. Implied contract based upon verbal representations and personnel policy. *Finley v. Aetna Life & Casualty Company*, 520 A.2d208 (1987)

b. Promissory estoppel. *D'Ulisse-Cupo v. Board of Directors of Notre Dame High School,* 5020 A.2d 217 (1986).

c. Covenant of good faith and fair dealing. *Magnan v. Anaconda Industries, Inc.,* 479 A.2d 781 (1984).

6. Does the state have a right to work law or other labor / management laws?

a. Connecticut does not have a right to work law.

b. Employees have a statutory right to form or join labor unions. Conn. Gen. Stat. § 31-104.

c. Employers are prohibited from discriminating against or interfering with employees on account of their exercise of their right to form or join labor unions. Conn. Gen. Stat. § 31-105.

7. What tort claims are recognized in the employment context?

a. Intentional infliction of emotional distress (during termination process only) - *Murray v. Bridgeport Hospital*, 480 A.2d 610 (1984).

b. Negligent infliction of emotional distress (during termination process only) – *Tomick v. UPS*, 43 A. 3rd 722 (2012).

c. Assault or battery - *Berry v. Loiseau,* 614 A.2d 414 (1992). d. Invasion of privacy – Handler v. Arends, 1995 Conn. Super. LEXIS 660 (1995).

e. Defamation – *Gambardella v. Apple Health Care, Inc.*, 969 A.2d 736 (2005).

As in all tort cases, jury trial is available. Actual damages and punitive damages (equal to legal fees and costs) may be awarded.

8. Is there a common law or statutory prohibition against discrimination / hostile work environment?

a. Race, color, religious creed, age, sex, gender identity or expression, marital status, national origin, ancestry, present or past history of mental disability, intellectual disability, learning disability or physical disability - Conn. Gen. Stat. § 46a-60(a)(1).

b. Genetic information - Conn. Gen. Stat. § 46a-60(a)(11).

c. Sexual harassment - Conn. Gen. Stat. § 46a-60(a)(8).

d. Pregnancy - Conn. Gen. Stat. § 46a-60(a)(7) and (10).

e. Inquiry regarding reproductive information - Conn. Gen. Stat. § 46a-60(a)(9).

Subject to required administrative remedies, damages may include reinstatement, lost wages and benefits and legal fees. Jury trial is available in an action against non-governmental entities.

9. Is there a common law or statutory prohibition of retaliation?

a. Workers' compensation claims - Conn. Gen. Stat. § 31-290a.

b. Military service - Conn. Gen. Stat. § 52-571.

c. Constitutional rights - Conn. Gen. Stat. § 31-51q.

d. Whistle blowing - Conn. Gen. Stat. § 31-51m.

e. Safety complaints - Conn. Gen. Stat. § 31-379; Conn. Gen. Stat. § 31-40a; Conn. Gen. Stat. § 31-40d.

f. Jury duty leave - Conn. Gen. Stat. § 51-247a.

g. Discrimination claim - Conn. Gen. Stat. § 46a-60(a)(4).

h. Paid sick leave - Conn. Gen. Stat. § 31-57v.

10. Is the state a deferral state for charges filed with the EEOC?

Yes, Connecticut is a deferral state. See *Walker v. Envirotest Systems, Inc.,* 77 F.Supp.2d 294, 296 fn.2 (D.Conn. 1999).

11. Are there any state laws related to compensation, including wage and hour, paid time off, mandatory breaks, fringe benefits, allowable deductions, prevailing wage rates for public contracts, etc.?

a. Wage and hour law - Conn. Gen. Stat. §§ 31-58 to 31-76m.

b. Minimum wage (currently $10.10 per hour) - Conn. Gen. Stat. § 31-58(i).

c. Withholding or diversion of wages – Conn. Gen. Stat. 31-71e.

d. Payment of wages upon termination of employment - Conn. Gen. Stat. § 31-71c.

e. Payment of accrued benefits upon termination of employment – Conn. Gen. Stat. § 31-76k.

f. Payment of overtime - Conn. Gen. Stat. § 31-76c.

g. Reduction in wages, hours, benefits and change in duties – Conn. Gen. Stat. § 31-71f.

h. Meal breaks – Conn. Gen. Stat. § 31-51ii(a).

Failure to pay earned wages may result in criminal charges and penalties under Conn. Gen. Stat. § 31-71g and civil penalties imposed by the Connecticut Department of Labor under Conn. Gen. Stat. § 31-69a. Jury trial is available. Damages in the amount of double wages owed plus costs and attorney's fees are available.

12. Is there a state statute governing paid or unpaid leaves?

a. Family and Medical Leave (75 employees or more) - Conn. Gen. Stat. § 31-51kk et seq.

b. Pregnancy - Conn. Gen. Stat. § 46a-60(a)(7).

c. Jury Duty - Conn. Gen. Stat. § 51-247a.

d. Paid sick leave (50 or more service workers) - Conn. Gen. Stat. § 31-57r et seq.

e. Domestic abuse victims - Conn. Gen. Stat. § 31-51ss.

f. Volunteer firefighter or EMT - Conn. Gen. Stat. § 7-322c.

13. Is there a state law governing drug-testing?

Conn. Gen. Stat. § 31-51t et seq.

14. Is there a medical marijuana statute?

Conn. Gen. Stat. § 21-408.

15. Is there trade secret / confidential information protection for employers?

Connecticut Uniform Trade Secrets Act – Conn. Gen. Stat. §§ 35-560 to 35-58.

16. Is there any law related toemployee's privacy rights?

a. Personnel files - Conn. Gen. Stat. § 31-128. There is no private right of action. This statute is administered and enforced by the Connecticut Department of Labor.

b. Electronic monitoring – Conn. Gen. Stat. § 31-48d. There is no private right of action (see *Gerardi v. City of Bridgeport*, 985 A.2d 328, 334 (Conn. 2010). Issues arising under this statute are administered and enforced by the Connecticut Department of Labor (see Conn. Gen. Stat. § 31-48d(c).

c. Medical screening – Conn. Gen. Stat. § 31-51y. There is a private right of action for claims arising under Connecticut's medical screening law. Jury trial is available and special and general damages are available together with attorney's fees and costs. This statute may also be enforced by the Connecticut Department of Labor (Conn. Gen. Stat. § 31-51z(a)).

d. Online privacy – Conn. Gen. Stat. § 31-40x. There is no private right of action. This statute is administered and enforced by the Connecticut Department of Labor (Conn. Gen. Stat. § 31-40x).

e. Protection of Social Security numbers and personal information – Conn. Gen. Stat. §§ 42-470 to 42-472d. There is no private right of action. This statute is administered and enforced by the Connecticut Department of Consumer Protection (Conn. Gen. Stat. § 42-472).

17. Is there any law restricting arbitration in the employment context?

No. Arbitration clauses are enforcement subject to the general requirements that the agreement to arbitrate is sufficiently clear and is conscionable.

18. Is there any law governing weapons in the employment context?

No, however an employer must exercise reasonable care to provide employee a reasonably safe place to work. Conn. Gen. Stat. § 31-49.

19. Miscellaneous employment or labor laws not discussed above?

Independent contractor/employee classification – Conn. Gen. Stat. § 31-222(a)(1)(B).

DELAWARE

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1. Is the state generally an employment-at-will state?

Subject to certain exceptions (addressed below), Delaware is an "employment-at-will" state, which means that an employer or employee may generally terminate an employment relationship at any time and for any reason unless a law or agreement provides otherwise.

2. Are there any statutory exceptions to the employment-at-will doctrine?

Yes, as discussed in the applicable sections below. (For example, anti-discrimination and anti-retaliation laws).

3. Are there any public policy exceptions to the employment-at-will doctrine?

In *Merrill v. Crothall–American, Inc.*, 606 A.2d 96 (1992), the Delaware Supreme Court recognized that even at will employment contracts do contain an implied covenant of good faith and fair dealing. Four years later, in *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436 (1996), the Delaware Supreme Court held that the implied covenant of good faith and fair dealing limits at-will employment only in very narrowly defined categories. Thus, a claim for wrongful discharge may lie: (i) where the termination violated public policy; (ii) where the employer misrepresented an important fact and the employee relied "thereon either to accept a new position or remain in a present one"; (iii) where the employer used its superior bargaining power to deprive an employee of clearly identifiable compensation related to the employee's past service; and (iv) where the employer falsified or manipulated employment records to create fictitious grounds for termination. *See Pressman*, 679 A.2d at 442–44 (discussed in *Lord v. Souder*, 748 A.2d 393 (Del. Supr. 2000)).

4. Is there any law related to the hiring process?

Background Information—Employers in Delaware can request from the Bureau of Identification criminal history records with a signed authorization from the applicant/employee, but the use of such records must be limited to the purpose for which they were disclosed and it is unlawful to request or disclose information about expunged records or about arrests that did not result in a conviction. (Del. Code. §§ 11-4374(i), 11-8513.)

Compensation History—Delaware law prohibits an employer from screening job applicants based on their salary history and from seeking that information from the applicant or a current or former employer. There may be an exception where the applicant voluntarily discloses the information or has accepted a job offer. (Del. Code. 19-709B.)

Polygraph Tests—Subject to certain exceptions, Delaware law (Del. Code § 19-704) prohibits employers – including the State and any agency or political subdivision thereof – from requiring, requesting, or suggesting that an employee or prospective employee to take a polygraph, lie detector, or similar test or examination as a condition of employment or continuation of employment. Violators are subject to a civil penalty of no less than $1,000 and no more than $5,000 for each violation. Discrimination and/or retaliation against anyone who complained of a violation of this law is also punishable by civil penalty in the same range.

Social Media—Employers in Delaware may not require or request an applicant or employee: (i) to disclose a personal social media username or password for the purpose of enabling employer access, (ii) to access their personal social media in the employer's presence, (iii) to use personal social media as a condition of employment, (iv) to divulge any personal social media, subject to exceptions, (v) to add, invite, or accept any person, including the employer, to the list of contacts associated with the applicant's personal social media, of (vi) to alter the settings of the applicant's personal social media that affect a third party's ability to view the contents thereof. (Del. Code. § 19-709A.)

5. Does the state recognize implied employment contracts under employment handbooks, policies, or practices?

Under certain circumstances, Delaware courts will recognize that an otherwise at-will employment relationship may be modified by a course of conduct that creates an implied agreement or by subsequent contractual restriction on the right of discharge. *E.g.*, *Mann v. Cargill Poultry, Inc.*, No. 88C-AU37, 1990 WL 91102 (Del. Super. Ct. June 13, 1990) (citing *Haney v. Laub*, 312 A.2d 330 (Del. Super. Ct. 1973); *Mapsco, Inc. v. Rapid Distribution Service, Inc.*, 509 A.2d 94 (Del. 1986)).

6. Does the state have a right to work law or other labor / management laws?

Delaware does not have a right to work law.

7. What tort claims are recognized in the employment context?

Invasion of Privacy—Delaware recognizes the common-law tort of invasion of privacy, which provides that one who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other person. Four separate claims compose this tort, and Delaware recognizes all four claims. (*Avallone v. Wilmington Medical Center, Inc.*, 553 F. Supp. 931 (D. Del. 1982)). These four claims are (1) Unreasonable intrusions upon the seclusion of others; (2) Appropriating another's name or likeness; (3) Giving unreasonable publicity to another's private life; or (4) Using publicity that unreasonably places another in a false light before the public.

8. Is there a common law or statutory prohibition against discrimination / hostile work environment?

Delaware's Discrimination in Employment Act (Del. Code §§ 19-710 to 19-719A) and Persons with Disabilities Protections Act (Del. Code §§ 19-720 to 19-728) prohibit employers with four (4) or more employees in Delaware from discriminating on the following factors: race/color; marital status; genetic information; age; religion; sex/gender; gender identity; sexual orientation; national origin; pregnancy, childbirth, and related medical conditions; reproductive healthcare decisions; caregiving responsibilities; status as a victim of domestic violence, sexual assault, and stalking; and last but not least, disability. The Delaware Discrimination in Employment Act extents to prohibit sexual harassment as well. (Del. Code § 19-711A.) And both laws prohibit retaliation against an employee for having opposed a discriminatory practice or having testified, assisted, or participated in any manner in an investigation, proceeding, or hearing to enforce the laws. Both laws permit a private civil action in which injunctive relief, compensatory damages, and costs and attorneys' fees may be awarded to the prevailing party.

9. Is there a common law or statutory prohibition of retaliation?

Discrimination Claims—As noted above, both the Delaware Discrimination in Employment Act and the Persons with Disabilities Protections Act prohibit retaliation. (Del. Code §§ 19-711(f), 19-726.)

Jury Duty—Delaware prohibits employers from discharging, penalizing, threatening, or otherwise coercing an employee because the employee receives or responds to a summons or serves as a juror. (Del. Code § 10-4515.)

Wage Claims—Delaware Code § 19-1112(b) provides for a civil penalty against any employer who discharges or discriminates against an employee because that employee made a complaint of gave information to the Department of Labor pursuant to Chapter 11 *or* because that employee filed (or is about to file) a private civil action or testified (or is about to testify) in any such proceeding.

Whistle Blowing—Delaware Code § 19-1703 prohibits an employer from discharging, threatening, or otherwise discriminating against an employee who is a bona fide whistle blower.

10. Is the state a deferral state for charges filed with the EEOC?

Delaware is a deferral state for charges files with the EEOC.

11. Are there any state laws related to compensation, including wage and hour, paid time off, mandatory breaks, fringe benefits, allowable deductions, prevailing wage rates for public contracts, etc.?

The starting point for Delaware's labor and employment laws is the Labor Title of the Delaware Code, which includes (but is not limited to) the following:

- **Minimum Wage—**Delaware currently has a minimum wage rate of $8.75 per hour, which will be increasing to $9.25 per hour effective October 1, 2019 (Del. Code § 19-902). But Delaware law permits employers to pay any employee who is under 18 years of age a wage rate that is no more than $0.50 less than the prescribed minimum wage.

Delaware law also permits employers to pay a "training wage" of no more than $0.50 less than the prescribed minimum wage during the first 90 consecutive calendar days of employment.
For tipped employees who regularly receive $30 or more each month in tips or gratuities, employers are permitted to pay only $2.23 per hour (the tip credit set by the federal government) and claim a "tip credit" for the rest of the minimum wage

- **Wage Payment and Collection—**Delaware's Wage Payment and Collection Act (Del. Code § 19-1101 *et seq.*) requires employers to pay all wages due to employees on regular paydays designated in advance and no less than once during each calendar month. Subject to certain exceptions, employers must pay all wages due within seven (7) days from the close of the pay period in which the wages were earned, however, if the regular payday falls on a non-work day, payment must be made on the preceding workday. This applies equally to current employees as well as those who have separated employment.

  Any employer who, without reasonable grounds for dispute, fails to pay and employee wages as required, is liable to the employee for liquidated damages in the lesser of the amount of 10 percent of the unpaid wages for each day (except Sunday and legal holidays) upon which such failure continues after the day on which payment was required or an amount equal to the unpaid wages.

  Delaware Code § 19-1107A prohibits differential pay based on gender except where the differential is based on (a) a seniority system, (b) a merit system, (c) a system which measures earnings by quantity or quality of production, or (d) any other factor other than sex, though an employer who is paying a wage rate differential in violation of this law shall not, in order to comply with the law, reduce the wage of any employee.

  Delaware employers may lawfully establish policies denying employees payment for accrued leave upon separation from employment. If, however, the employer's policy provides for payout of accrued leave, then the employer is required to pay such accrued leave to an employee upon separation from employment. (Del. Code. § 19-1109.)

  The law empowers the Department of Labor to administer and enforce Chapter 11 of Title 19 of the Delaware Code (Del. Code § 19-1111) and also permits a private civil action (Del. Code § 19-1113). An employer in violation of this Chapter is subject to a civil penalty of no less than $1,000 and no more than $5,000 for each violation. If the employee is successful, the judgment must include an award for the costs of the action, the necessary costs of prosecution, and reasonable attorneys' fees. In actions brought by the Department of Labor, the expenses and attorneys' fees are payable to the Delaware State Treasurer.

- **Mandatory Breaks—**Delaware law requires employers to grant a meal break of at least 30 minutes to employees to employees 18 years of age or older scheduled to work 7.5 or more hours per day (Del. Code § 19-707) and an equivalent meal break to employees under the age of 18 scheduled to work more than 5 hours continuously per day (Del. Code § 19-507). Meal breaks must be provided sometime after the first two (2) hours of work and before the last (2) hours of work. This rule does not apply in two particular circumstances: (1) the employee is a professional employee certified by Delaware's State Board of Education and employed by a local school board to work directly with children, and (2) there is a collective bargaining agreement or other employer-employee written agreement that provides otherwise. The Delaware Secretary of Labor has also issued rules granting exemptions when: (1) compliance would adversely affect public safety, (2) only one employee may perform the duties of a position, (3) an employer has fewer than five employees on a shift at one location (the exception would only apply to that shift), or (4) the continuous nature of the employer's operations, such as chemical production of research experiments, requires employees to respond to urgent or unusual conditions at all times and the employees are compensated for their meal breaks. Where exemptions are allowed, employees must be permitted to eat meals at their workstations or other authorized locations and use restroom facilities as reasonably necessary.

12. Is there a state statute governing paid or unpaid leaves?

Jury Duty—Delaware employers are not required to pay employees for responding to a jury summons or for serving on a jury, however, an employer may not consider as wages the fee paid by the state to an employee for jury service. (Del. Code § 10-4514.)

Military—Delaware law affords any National Guard member who is called to state active duty the same rights, privileges, and protections with regard to employment as s/he would have had if called for military training under federal law protecting reservists and National Guard members. If an employer fails to comply with such laws, the employee may bring an action for damages or other appropriate relief in the Superior Court of Delaware. (Del. Code § 20-905.)

13. Is there a state law governing drug-testing?

Delaware places no restrictions on drug testing in private employment.

14. Is there a medical marijuana statute?

Since 2011, Delaware has authorized medical marijuana for 15 enumerated medical conditions including, but not limited to, Alzheimer's, cancer, epilepsy, HIV/AIDS, migraine, PTSD, and seizures. An authorized patient is limited to possession of six ounces at a time. (Del. Code. §§ 16-4901A to 16-4928A.)

15. Is there trade secret / confidential information protection for employers?

Like most states, Delaware has enacted the Uniform Trade Secrets Act (Del. Code §§ 6-2001 to 6-2009), which provides employers with legal protection for trade secret information even in the absence of a contractual agreement.

16. Is there any law related to employee's privacy rights?

Monitoring of Telephone, Email, and Internet Usage—Employers in Delaware may not monitor or otherwise intercept any telephone conversation/transmission, email, or Internet access/usage by an employee unless the employer either: (1) provides an electronic notice of such monitoring or intercepting policies or activities to the employee at least once during each day the employee accesses the employer-provided email or Internet access services; or (2) has first given a 1-time notice (in writing, in an electronic record, or in another electronic form), acknowledged by the employee either in writing or electronically, of such monitoring or intercepting activity or policies. (Del. Code § 19-705.) A violation of this statute is subject to a civil penalty of $100 per violation, but the law specifically provides that such civil penalty shall not be deemed to be an exclusive remedy and shall not otherwise bar any person from pursuing other remedies available.

Personal Identifying Information—Any employer who seeks to dispose of records containing employees' personal identifying information (PII) must take all reasonable steps to destroy or arrange for the destruction of such record by shredding, erasing, or otherwise destroying or modifying the PII to make it unreadable or indecipherable. For the purpose of this law, PII means an employee's first name or first initial and last name in combination with his/her social security number, passport number, driver's license or state identification card number, insurance policy number, financial services account number, bank account number, credit card number, debit card number, tax or payroll information, or confidential health care information. (Del. Code. § 19-736.)

Polygraph Test—See Section 4 above regarding Delaware's prohibition on employers requiring applicants or employees to submit to polygraph or similar tests. (Del. Code § 19-704.)

Social Media—See Section 4 above regarding Delaware's prohibition on employers requiring applicants or employees to allow access to personal social media. (Del. Code § 19-709A.)

17. Is there any law restricting arbitration in the employment context?

Delaware does not have any laws restricting arbitration in the employment context.

18. Is there any law governing weapons in the employment context?

Delaware does not have any law governing weapons in the employment context.

FLORIDA

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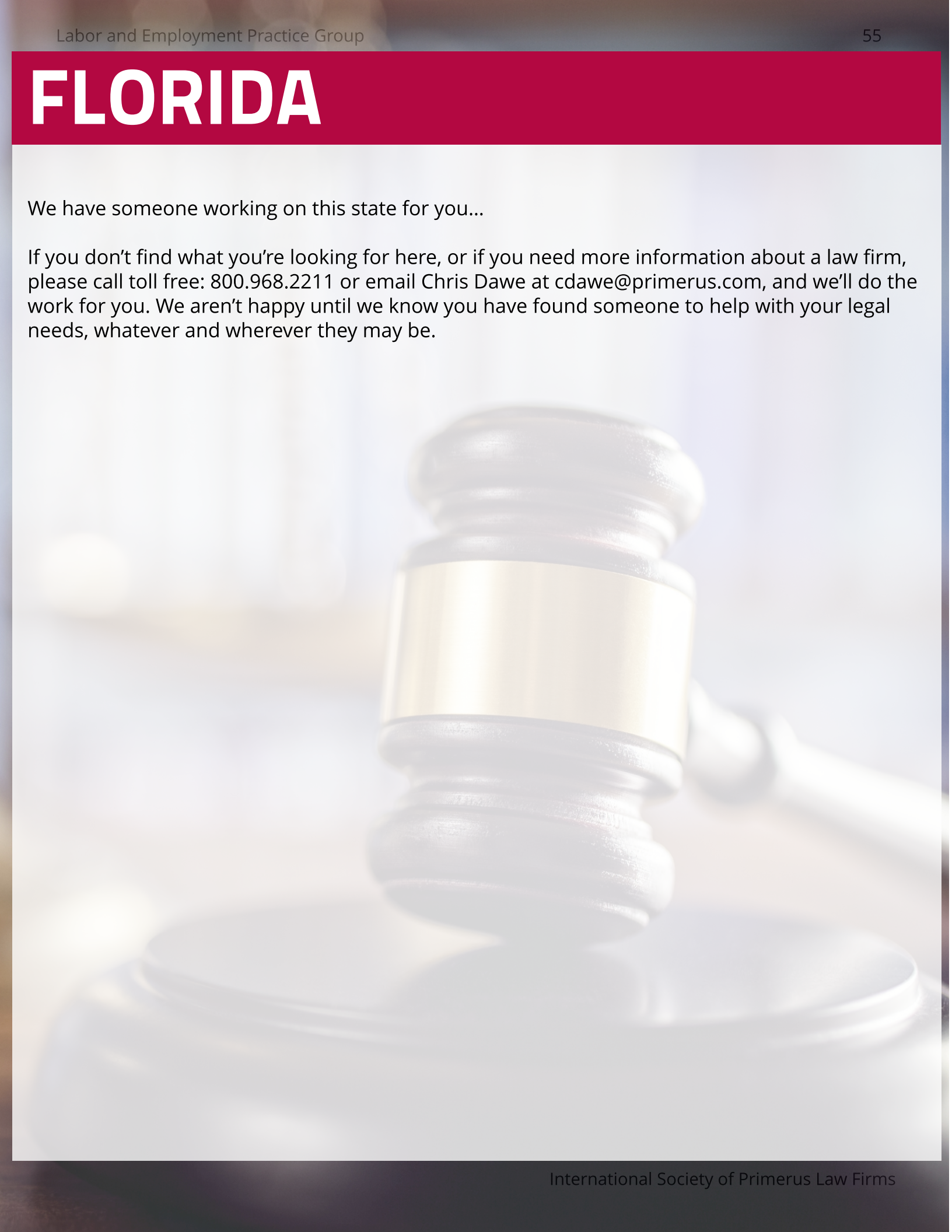

GEORGIA

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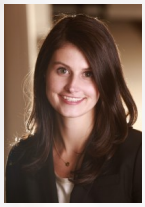

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1. Is the state generally an employment-at-will state?

Yes, Georgia is an employment-at-will state. O.C.G.A. § 34-7-1 ("An indefinite hiring may be terminated at will by either party.").

2. Are there any statutory exceptions to the employment-at-will doctrine?

Yes, statutory exceptions to the at-will doctrine include: O.C.G.A. § 18-4-7 prohibits the discharge of any employee because his or her earnings have been subjected to garnishment. O.C.G.A. § 34-1-2 criminalizes the discharge of employees on the basis of age. O.C.G.A. § 34-1-3 prohibits discharging an employee because he or she attended a judicial proceeding in response to a court order. O.C.G.A. § 34-6A-1 prohibits the discharge of employees because of a disability.

3. Are there any public policy exceptions to the employment-at-will doctrine?

No, there are no public policy exceptions in Georgia to the at-will doctrine. See *Reilly v. Alcan Aluminum Corp.*, 528 S.E.2d 238, 239–40 (Ga. 2000).

4. Is there any law related to the hiring process?

Yes, Georgia law requires employers comply with laws relating to (1) the employment of immigrants, (2) application requirements in certain industries, (3) background checks, (4) reporting new hires, and (5) the employment of first-time criminal offenders.

a. Immigration

Requirement: Under the Illegal Immigration Reform and Enforcement Act, Georgia employers with more than ten employees are required to register with and use the federal E-Verify program to determine the employment eligibility of newly-hired employees. O.C.G.A. § 36-60-6.

An employer renewing a business license or certificate must attest that it either (a) uses the E-Verify program as required, or (b) is exempt from the law's requirements by having ten or fewer employees. O.C.G.A § 36-60-6(d)(2).

Additionally, the employee must (a) work at least 35 hours per week, and (b) perform work under the direction and supervision of an employer who withholds FICA, federal income tax, or state income tax; or issues a W-2 form to the employee to document pay. O.C.G.A. §§ 36-60-6(b) and 48-13-5(1.1)(A).

Remedies: The Illegal Immigration Reform and Enforcement Act does not include a private right of action. Instead, the Attorney General is authorized to conduct an investigation and bring any criminal or civil action necessary to ensure compliance.

b. Employment Applications

Requirements: Georgia law requires nursing homes and personal care homes, as defined in O.C.G.A. §§ 31-7-250(11), 31-7-12, and 31-7-12.2 , to request a criminal background check on applicants for employment. (O.C.G.A. §§ 31-7-259(a), (b) and 31-7-351(a). These employers must give applicants clear notice of the criminal background check requirement on all employment application forms. O.C.G.A. §§ 31-7-259(f) and 31-7-351(c).

On October 1, 2019, the Georgia Long-Term Care Background Check Program goes into effect (O.C.G.A. §§ 31-7-350 to

31-7-361). Applicants of facilities covered under this law must consent to a national and state background check that includes:

- A registry check.
- A check of information maintained by a professional licensing board, if applicable.
- A criminal background check.

Under current law, each application form provided by the employer to an applicant must conspicuously state the following:

FOR THIS TYPE OF EMPLOYMENT, STATE LAW REQUIRES A CRIMINAL RECORD CHECK AS A CONDITION OF EMPLOYMENT.

(O.C.G.A. §§ 31-7-259(f) and 31-7-351(c).)

Effective October 1, 2019, each application form provided by a facility covered under the Georgia Long-Term Care Background Check Program must conspicuously state the following

FOR THIS TYPE OF EMPLOYMENT, STATE LAW REQUIRES A NATIONAL AND STATE BACKGROUND CHECK AS A CONDITION OF EMPLOYMENT.

(O.C.G.A. § 31-7-357.)

Other Prohibitions: Georgia law generally does not prohibit employers from asking certain questions on employment applications, including inquiries into arrests or convictions. Although there are no absolute prohibitions on questions in the application process, an employer may not discriminate against an applicant or employee in an employment application on the basis of age, sex, or disability. O.C.G.A. §§ 34-1-2, 34-5-3, and 34-6A-4.

Remedies: There is no private cause of action. A personal care home that hires an applicant for employment with a criminal record may receive a "civil penalty." O.C.G.A. § 31-7-259(m). A nursing home that hires an applicant for employment with a criminal record shall be liable for a civil monetary penalty in the amount of the lesser of $2,500.00 or $500.00 for each day that a violation occurs. O.C.G.A. § 31-7-353.

c. Background Checks

Obtaining Criminal Record: An employer must provide an applicant's fingerprints or signed consent to obtain a criminal record from the Georgia Crime Information Center. Employers may not obtain or use sealed records. O.C.G.A. §§ 15-11-701 and 35-3-37.

Use in Hiring: When an employer terminates or declines to hire an employee or applicant after obtaining a criminal history record from the Georgia Crime Information Center, the employer must inform the applicant or employee of all information surrounding the decision, including: (1) information that it obtained a record; (2) the specific contents of the record; or (3) the effect the record had on the decision. O.C.G.A. § 35-3-34(b).

Remedies: Failure to provide this information is a misdemeanor. O.C.G.A. § 35-3-34(b).

An employer that knowingly requests, obtains, or attempts to obtain criminal history record information under false pretenses or communicates or attempts to communicate that information to anyone except as permitted under this law may be subject to either or both: fines of up to $5,000; or imprisonment of up to two years. O.C.G.A. § 35-3-38(a).

For negligent disclosures of criminal history record information, an employer may be subject to either or both: fines of up to $100; or imprisonment of up to ten days. O.C.G.A. § 35-3-38(b).

d. New Hire Reporting

Requirement: Georgia employers must report all new hires, recalls, or rehires to the GDOL within ten days of the hiring, rehiring, or employee's return to work. O.C.G.A. § 19-11-9.2(c). The report must include the:

- Employee's name, address, social security number, and date of birth; and
- Employer's name, address; and employment security number or unified business identifier number.

Employers can provide notice to the GDOL by doing any of the following:

- Completing an online report;
- Submitting a New Hire Reporting Form;
- Submitting a W-4 form; or
- Submitting a spreadsheet with the required information.

Notice can also be provided through an employer's payroll or accounting services.

Remedies: Failure to report the required information can result in a written warning issued to the employer. O.C.G.A. § 19-11-9.2(c)

e. First Offender Criminal History

Requirement: For criminal defendants who have never been convicted of a felony, Georgia's First Offender Act, O.C.G.A. §§ 42-8-60 to 42-8-66, allows some defendants to avoid a conviction record. For these offenders:

- Because successful completion of the program results in a dismissal of the charge, applicants with no criminal history other than participation in the first offender program may truthfully respond "no" to a pre-employment inquiry regarding whether the person has been convicted of a crime, O.C.G.A. § 42-8-62; and
- Employers are generally prohibited from denying employment based on an applicant's discharge from criminal conviction under the statute, O.C.G.A. § 42-8-63.

Employers in certain industries (i.e., childcare, eldercare, care for disabled, law enforcement) are granted the specific statutory exceptions to deny employment to job applicants who were discharged under the first offender program for certain crimes on or after July 1, 2004. O.C.G.A. § 42-8-63.1.

Remedies: There is no statutory private cause of action for violation of the state. *Mattox. v. Freight Systems, Inc.*, 534 S.E.2d 561 (Ga. App. Ct. 2000).

f. Employment History

Requirement: An employer who discloses factual information concerning an employee or former employee's job performance upon request of the prospective employer of the person seeking employment is presumed to be acting in good faith unless lack of good faith is shown by a preponderance of the evidence or unless the information is disclosed in violation of a nondisclosure agreement or the information disclosed was otherwise considered confidential according to any other law. O.C.G.A. § 34-1-4.

5. Does the state recognize implied employment contracts under employment handbooks, policies, or practices?

Generally, no. In Georgia, courts generally do not find employee handbooks to constitute binding contracts. *See Burgess v. Decatur Fed. Sav. & Loan*, 345 S.E.2d 45, 46 (Ga. Ct. App. 1986). Georgia courts, however, have "held that provisions in an employee manual relating to additional compensation plans, of which an employee is aware, may amount to a binding contract between the parties." *Ellison v. DeKalb Cnty.*, 511 S.E.2d 284, 285 (Ga. Ct. App. 1999). These compensation plans may relate to disabilities benefits, vacation pay, or severance pay. *See Fulton–DeKalb Hosp. Auth. v. Metzger,* 417 S.E.2d 163 (Ga. Ct. App. 1992) (disability benefits); *Shannon v. Huntley's Jiffy Stores,* 329 S.E.2d 208 (Ga. Ct. App. 1985) (vacation pay); *Fletcher v. Amax, Inc.,* 288 S.E.2d 49 (Ga. Ct. App. 1981) (severance pay).

In connection with compensation, Georgia courts reason that "the additional compensation plan set forth in the manual represents an offer by the employer which the employee implicitly accepts by remaining in employment." *Ellison*, 511 S.E.2d at 285. In contrast, "personnel manuals stating that employees can be terminated only for cause and setting forth termination procedures are not contracts of employment; failure to follow the termination procedures contained in them is not actionable." *Id.* (quoting *Jones v. Chatham County,* 477 S.E.2d 889 (1996)).

6. Does the state have a right to work law or other labor / management laws?

Yes, Georgia has a right to work statute. O.C.G.A. § 34-6-21 *et seq.* Under Georgia's law, no individual can be required as a condition of employment or continuance of employment to be or remain a member or an affiliate of a labor organization or to resign from or to refrain from membership in or affiliation with a labor organization. O.C.G.A. § 34-6-21(a). Likewise, no individual can be required as a condition of employment or continuance of employment to pay any fee, assessment, or other sum of money to a labor organization. O.C.G.A. § 34-6-22.

Penalties: Any individual whose employment is affected, or may be affected, by any contract that violates Georgia's right to work statute can seek an injunction. In any such proceeding, the plaintiff shall be entitled to his costs and reasonable attorneys' fees and shall recover actual damages sustained by him. O.C.G.A. § 34-6-27.

7. What tort claims are recognized in the employment context?

In addition to the anti-discrimination and trade secret/confidential information laws discussed *infra*, Georgia recognizes several torts in the employment context, including: (1) intentional infliction of emotional distress, (2) negligent infliction of emotional

a. Intentional Infliction of Emotional Distress

Claim Elements: Georgia recognizes a claim for intentional infliction of emotional distress. To bring such a claim, a plaintiff must show (1) the defendant's conduct was intentional or reckless, (2) the conduct was extreme and outrageous, (3) a causal connection between the wrongful conduct and the plaintiff's emotional distress, and (4) severe emotional distress. *Standard v. Falstad*, 779 S.E.2d 682, 686 (Ga. App. Ct. 2015).

The standard for this tort is both subjective and objective. The distress must be "so severe that no reasonable [person] could be expected to endure it." *Abdul-Malik v. AirTran Airways, Inc.*, 678 S.E.2d 555, 560 (Ga. Ct. App. 2009). However, "[a] defendant's knowledge of a plaintiff's particular susceptibility to injury from emotional distress is often critical in weighing the extreme and outrageous character of conduct . . . ." *Cooler v. Baker*, 420 S.E.2d 649, 651 (Ga. Ct. App. 1992)(quoting *Williams v. Voljavec*, 415 S.E.2d 31(Ga. Ct. App. 1992)).

Employment Considerations: In the employment context, Georgia courts have discussed the interplay between claims for intentional infliction of emotional distress and Georgia's at-will employment statute. A plaintiff is unable to base his intentional infliction of emotional distress claim solely upon his termination. *See, e.g.*, *Ray v. Edwards*, 557 F. Supp. 664, 674 (N.D. Ga. 1982) (under Georgia law, former superintendent was terminable at will, and therefore could not maintain cause of action for intentional infliction of emotional distress arising out of defendants' alleged conspiracy to terminate him from his position).

Case Examples: Georgia courts are reluctant to find intentional infliction of emotional distress, as demonstrated by cases wherein the court declined to find intentional infliction of emotional distress. For example, the court held the plaintiff could not support a claim for intentional infliction of emotional distress based upon the following:

Giving false and insufficient reasons for discharging a person, *Anderberg v. Ga. Elec. Membership Corp.*, 332 S.E.2d 326, 328 (Ga. Ct. App. 1985);

Obscene language used by superiors while criticizing work performance, and firing for non-employment reasons, *ITT Rayonier, Inc. v. McLaney*, 420 S.E.2d 610 (Ga. Ct. App. 1992); *Jarrard v. United Parcel Serv., Inc.*, 529 S.E.2d 144 (Ga. Ct. App. 2000) ;

Reassigning a non-tenured professor to another department, *Johnson v. Savannah Coll. of Art & Design, Inc.*, 460 S.E.2d 308 (Ga. Ct. App. 1995); and

Insults, indignities, threats, annoyances, petty oppression, or other trivialities in the workplace, *Moses v. Prudential Ins. Co. of Am.*, 369 S.E.2d 541 (Ga. Ct. App. 1988).

Conversely, examples of behavior that has been found to be intentional infliction of emotional distress include the following:

Sexual harassment accompanied with threats of discharge over a long period of time, continuing both on and off the job site, *Cummings v. Walsh Const. Co.*, 561 F. Supp. 872, 882 (S.D. Ga. 1983); and

Discharging an employee for refusal to engage in illegal price fixing six days before Christmas, *Thomason v. Mitsubishi Elec. Sales Am., Inc.*, 701 F. Supp. 1563, 1567 (N.D. Ga. 1988).

Worker's Compensation: Under Georgia law, claims for intentional infliction of emotional distress fall outside the state workers' compensation scheme, and plaintiffs must pursue claims in private actions when lacking evidence of any physical injury or physical disability arising from the distress. Where some physical impetus causes the emotional trauma, the party must collect under workers' compensation.

b. Negligent Infliction of Emotional Distress

Claim Elements: In addition to proving the elements of a general negligence claim, to bring a claim for negligent infliction of emotional distress, a plaintiff must also demonstrate a "physical impact." *Johnson v. Allen*, 613 S.E.2d 657, 663 (Ga. Ct. App. 2005) "[T]he current Georgia impact rule has three elements: (1) a physical impact to the plaintiff; (2) the physical impact causes physical injury to the plaintiff; and (3) the physical injury to the plaintiff causes the plaintiff's mental suffering or emotional distress." Id.; see also *Anderson v. Dunbar Armored, Inc.,* 678 F. Supp. 2d 1280, 1333 (N.D. Ga. 2009)(dismissing plaintiff's negligent infliction of emotion distress claim because the plaintiff had not "suffered a physical impact during her employment with Defendant [], and, as such she cannot prevail on her claim for negligent infliction of emotional distress").

c. Assault/Battery

Claim Elements: Any act of physical violence, inflicted on the person of another, which is unnecessary, is not privileged, and which constitutes a harmful or offensive contact constitutes an assault and battery. *Vasquez v. Smith*, 576 S.E.2d 59 (Ga. Ct. App. 2003). For example, the smoke from a coworker's pipe can constitute battery when it touches another employee and the other employee finds that touching offensive or harmful. *Hennly v. Richardson*, 444 S.E.2d 317 (Ga. 1994). However, if the coworker's smoking is a part of the working environment and is not directed at the injured employee, all claims are barred by the exclusive remedy provision of the Workers' Compensation Act. *Id.*

Employment Considerations: Assault and battery is important in the employment context because, under Georgia law, an employer may be responsible for an assault and battery committed by his employee if the employee was acting within the scope of his employment. *Jones v. Reserve Ins. Co.*, 253 S.E.2d 849 (Ga. Ct. App. 1979).

Worker's Compensation: Even an ordinary battery claim is barred by the exclusive remedy provision of the Workers' Compensation Act as long as the animosity which created the battery arises from some aspect of the work. *Baldwin v. Roberts*, 442 S.E.2d 272 (Ga. Ct. App. 1994).

d. Invasion of Privacy

Types of Claims: Georgia common law divides the invasion of privacy tort into four different tortious acts, *Cabaniss v. Hipsley*, 151 S.E.2d 496, 500 (Ga. Ct. App. 1966):

Intrusion on the plaintiff's seclusion or solitude, or into the plaintiff's private affairs;

Public disclosure of embarrassing facts about the plaintiff;

Publicity which places the plaintiff in a false light in the public eye; and

Appropriation for the defendant's advantage of the plaintiff's name or likeness.

Intrusion on the Plaintiff's Seclusion or Solitude or into Plaintiff's Private Affairs: The Georgia Supreme Court has held that an unreasonable intrusion involves a prying or intrusion into a person's private concerns, which would be offensive or objectionable to a reasonable person. *Yarbray v. S. Bell Tel. & Tel. Co.*, 409 S.E.2d 835, 837 (Ga. 1991).

Public Disclosure of Embarrassing Facts About the Plaintiff: To recover under this theory, an employee must show all of the following, *Cabaniss*, 151 S.E.2d at 501:

There was public disclosure of private facts;

The facts disclosed to the public were private, secluded, or secret facts and were not public facts; and

The matter in which the facts were made public would be offensive and objectionable to a reasonable person of ordinary sensibilities under the circumstances.

Publicity Which Places the Plaintiff in a False Light in the Public Eye: To prove a false light claim in Georgia, a plaintiff must show, *Ass'n Servs., Inc. v. Smith*, 549 S.E.2d 454, 459 (Ga. Ct. App. 2001):

The existence of false publicity that depicts the plaintiff as something or someone which the plaintiff is not; and

That the false light in which the plaintiff was placed would be highly offensive to a reasonable person.

Appropriation for the Defendant's Advantage of the Plaintiff's Name or Likeness: To satisfy the appropriation invasion of privacy tort, the plaintiff must show that, *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697, 703 (Ga. 1982):

The defendant appropriated plaintiff's name or likeness; and

The appropriation was for the defendant's benefit, use, or advantage.

Unlike intrusion, disclosure, or false light, appropriation does not require the invasion of something secret, secluded, or private pertaining to the plaintiff and does not involve falsity. The appropriation tort protects plaintiff's interest in the exclusive use of the plaintiff's name and likeness as an aspect of his identity. *Martin Luther King, Jr.*, 296 S.E.2d at 703.

Defenses: An employer may make an affirmative defense to an invasion of privacy claim by showing that the employee has no reasonable expectation of privacy, solitude, or seclusion in the workplace. *Yarbray,* 409 S.E. 2d at 837.

Georgia law also provides that certain communications are privileged from invasion of privacy claims (O.C.G.A. §

Statements made in good faith in the performance of a public duty;

Statements made in good faith in the performance of a legal or moral private duty;

Statements made with a good faith intent on the part of the speaker to protect his interest in a matter in which it is concerned;

Statements made in good faith as part of an act to further the person's or entity's right of petition or free speech under the US Constitution or the Georgia Constitution concerning an issue of public interest or concern, as defined in O.C.G.A. § 9-11-11.1(c);

Fair and honest reports of the proceedings of legislative or judicial bodies;

Fair and honest reports of court proceedings;

Comments of counsel, fairly made, on the circumstances of a case in which the counsel is involved and concerning the conduct of the parties in the case;

Truthful reports of information received from any arresting officer or police authorities; and

Comments on the acts of public persons in their public capacity

e. Fraud

Claim Elements: Fraud may be either actual or constructive. "Actual fraud consists of any kind of artifice by which another is deceived. Constructive fraud consists of any act of omission or commission, contrary to legal or equitable duty, trust, or confidence justly reposed, which is contrary to good conscience and operates to the injury of another." O.C.G.A. § 23-2-51(b).

Employment Considerations: Fraud generally impacts employment relationships in two ways. First, a discharged employee may bring a fraud claim alleging his employer promised employment for a certain period of time, while never intending to keep that promise. Second, an employee may bring a fraud claim alleging that his employer promised him certain compensation, commissions, or other benefits, with either no intention of giving them or recklessly promising them.

Employees are generally unsuccessful in actions for fraud. Georgia courts have held that actionable fraud cannot be based upon promises as to future events. *Edwards v. Central Ga. HHS, Inc.*, 558 S.E.2d 815 (Ga. Ct. App. 2002) (although fraud may be predicated on the promise made with a present intention not to perform, this exception does not apply where the promises are unenforceable even absent any fraud at the time of their utterance because the underlying employment contract, being terminable at will, is unenforceable). *But see Ikemiya v. Shibamoto Am., Inc.*, 444 S.E.2d 351 (Ga. Ct. App. 1994) (fraud can be predicated on a misrepresentation as to a future event where the defendant knows that the future event will not take place).

Actual fraud also fails when the plaintiff is not entitled to rely upon the promise. "Fraud cannot be based on an unenforceable promise." *O'Neal v. Home Town Bank of Villa Rica*, 514 S.E.2d 669, 675 (Ga. Ct. App. 1999). For example, the Georgia Court of Appeals held plaintiff could not maintain fraud claim premised upon an oral acceptance of a written offer of employment that could not be performed within one year because this purported employment contract violated the statute of frauds. *Presto v. Sci.-Atlanta, Inc.*, 388 S.E.2d 719 (Ga. Ct. App. 1989)

Worker's Compensation: "Georgia law provides a common law cause of action for fraud or other torts committed by an employer where such act is not an accident arising out of and in the course of employment, and where a reasonable remedy for such conduct is not provided by the Workers' Compensation Act." *Griggs v. All-Steel Bldgs., Inc.*, 433 S.E.2d 89, 92 (Ga. Ct. App. 1993).

f. Tortious Interference With Contractual Relations

Claim Elements: Georgia recognizes a cause of action for tortious interference with contractual relations. O.C.G.A. § 51-9-1. Either an employer or an employee may bring the action, and they may seek injunctive relief and monetary damages.

Tortious interference is an intentional tort, and a plaintiff must show the defendant knew of the employment contract and intentionally interfered. *Singleton v. Itson*, 383 S.E.2d 598, 599 (Ga. Ct. App. 1989). "Tortious interference with contractual relations is applicable only when the interference is done by one who is a stranger to the contract." *Nexus Servs., Inc. v. Manning Tronics, Inc.*, 410 S.E.2d 810, 811 (Ga. Ct. App. 1991).

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g. Defamation

Claim Elements: Georgia law recognizes both (1) written defamation (libel) and (2) oral defamation (slander). O.C.G.A. §§ 51-5-1 and 51-5-4. The Georgia Code defines libel as "a false and malicious defamation of another, expressed in print, writing, pictures or signs, tending to injure the reputation of the person and exposing him to public hatred, contempt or ridicule." O.C.G.A. § 51-5-1(a). Slander is an oral communication: (1) imputing to another a crime punishable by law; (2) charging a person with having some contagious disorder or with being guilty of some debasing act which may exclude him from society; (3) making charges against another in reference to his trade, office, or profession, calculated to injure him therein; or (4) uttering any disparaging words productive of special damage which flows naturally therefrom. O.C.G.A. § 51-5-1(b).

Employment Considerations: Publication is an essential element to maintain a defamation action. But under Georgia law, an exception to the broad definition of publication in the employment context has evolved: "[W]hen the communication is intracorporate . . . and is heard by one who, because of his/her duty or authority has reason to receive the information, there is no publication of the allegedly slanderous material, and without publication, there is no cause of action for slander." *Kurtz v. Williams*, 371 S.E.2d 878, 880 (Ga. Ct. App. 1988). Administrators, supervisory personnel, and personnel department representatives typically have a duty or the authority to receive information.

Where a former employee expressly authorizes his former employer to communicate information to an agent of a prospective employer, the court may refuse to find a publication because the communication occurred between parties authorized to receive it. *Kenney v. Gilmore*, 393 S.E.2d 472, 473 (Ga. Ct. App. 1990)

In defending against a defamation action, employers may utilize one of the following defenses: truth, opinion, and privilege. First, "[t]he truth of the charge made may always be proved in justification of an alleged libel or slander." O.C.G.A. § 51-5-6. Second, courts have held that "[t]he expression of opinion on matters with respect to which reasonable men might entertain differing opinions is not slanderous." *Bergen v. Martindale-Hubbell, Inc.*, 337 S.E.2d 770, 771 (Ga. Ct. App. 1985)

Finally, an employer may defend a defamation action because his communication was privileged. The Georgia Code lists several privileges which are particularly applicable to employers. O.C.G.A. § 51-5-7 makes the following privileged: "(1) statements made in good faith in the performance of a public duty; [and] (2) statements made in good faith in the performance of a legal or moral private duty . . . ."

Further, "Georgia courts have long recognized that a prima facie privilege shields statements made concerning a current or former employee by a current or former employer to one, such as a prospective employer, who has a legitimate interest in such information." *Kenney*, 393 S.E.2d at 473. Georgia law also provides broad immunity for all employers who disclose factual information concerning an employee's or former employee's job performance to a prospective employer. O.C.G.A. § 34-1-4. The statute creates a presumption that the employer who is providing information is acting in good faith unless lack of good faith is shown by a preponderance of the evidence.

The rules regarding defamation by a corporation depend upon whether the defamation is oral or written. The Georgia courts have held that a corporate defendant "is not liable for damages resulting from the speaking of a false, malicious or defamatory words by one of its agents, even where in uttering such words the speaker was acting for the benefit of the corporation and within the scope of the duties of his agency, unless it affirmatively appears that the agent was expressly directed or authorized by the corporation to speak the words in question." *Swift v. S. S. Kresge Co.*, 284 S.E.2d 74, 75 (Ga. Ct. App. 1981).. The rule regarding corporate libel, however, does not require that the agent be expressly authorized or directed to publish the libel. A corporation's libel is determined under the doctrine of *respondeat superior*. Thus, an employer is liable for its employees' written defamation if the employees were acting within the scope of their employment at the time they made the communication. *Mulherin v. Globe Oil Co.*, 328 S.E.2d 406, 408 (Ga. Ct. App. 1985).

Workers' Compensation: The Georgia Workers' Compensation Act does not bar a slander claim brought by an employee. Thus, an employee may seek damages when his employer slanders him. *Oliver v. Wal-Mart Stores, Inc.*, 434 S.E.2d 500, 500–01 (Ga. Ct. App. 1993).

h. False Imprisonment

Claim Elements: The Georgia Code defines false imprisonment as "the unlawful detention of the person of another, for any length of time, whereby such person is deprived of his personal liberty." O.C.G.A. § 51-7-20.

Employment Considerations: An employer faces a suit for false imprisonment when he detains an employee for wrongdoing or to gather information concerning wrongdoing. The two issues confronting an employer are (1) whether

a sufficient confinement has occurred, and (2) whether the employer's actions were justified. *See Crowe v. J.C. Penney, Inc.*, 340 S.E.2d 192 (1Ga. Ct. App. 986).

A detention may arise out of either physical restraint or "words, acts, gestures or the like, which induce a reasonable apprehension that force will be used if the plaintiff does not submit." *Seligman & Latz of Atlanta, Inc. v. Grant*, 158 S.E.2d 483, 484 (Ga. Ct. App. 1967). The fear of losing one's job does not constitute the necessary fear of personal difficulty to support a claim of false imprisonment. *Miraliakbari v. Pennicooke*, 561 S.E.2d 483 (Ga. Ct. App. 2002). Additionally, an employee is not "detained" if he or she consents to questioning or confinement. *See Crowe*, 340 S.E.2d at 192.

Even if an employee is confined, an employer will only be liable for false imprisonment if the confinement was unjustified. The employer must show that probable cause existed and that exigent circumstances obviated the need to obtain a warrant. *Hill v. Ga. Power Co.*, 786 F.2d 1071 (11th Cir. 1986). "In assessing the legality of a detention, the issue is not whether the person detained is actually guilty of a crime, just whether a reasonably prudent man had good cause to believe a crime had been committed." *Id.* at 1079.

Workers' Compensation: "[I]f [the plaintiff] establish[es] a claim of false imprisonment, [i]t is well settled in this state that a claim under the [W]orkers' [C]ompensation [A]ct is the employee's sole and exclusive remedy for injury or occupational disease incurred *in the course of employment*." *Bryant v. Wal-Mart Stores, Inc.*, 417 S.E.2d 688, 690 (Ga. Ct. App. 1992) (holding claim of false imprisonment, arising out of death of night shift worker when emergency medical personnel were unable to enter locked store and revive her after her stroke, was barred by exclusivity provisions of Workers' Compensation Act).

8. Is there a common law or statutory prohibition against discrimination / hostile work environment?

Yes, several state statutes prohibit discrimination. The Fair Employment Practice Act broadly prohibits discrimination in public employment on the basis of race, color, religion, national origin, sex, handicap, or age. The Georgia Equal Pay for Equal Work Act prohibits discrimination in pay based upon gender in public and private employment. The Georgia Age Discrimination in Employment Act prohibits age discrimination in public and private employment. The Georgia Equal Employment for Persons with Disabilities Code prohibits disability discrimination in public and private employment.

a. The Fair Employment Practice Act

Anti-Discrimination in Public Employment: The Fair Employment Practices Act (FEPA) prohibits discrimination, which it defines as any direct or indirect act or practice of exclusion, distinction, restriction, segregation, limitation, refusal, denial, or any other act or practice of differentiation or preference in the treatment of a person or persons because of race, color, religion, national origin, sex, handicap, or age or the aiding, abetting, inciting, coercing, or compelling of such an act or practice. O.C.G.A. § 45-19-22(4).

Conduct Prohibited: The FEPA prohibits five basic types of discriminatory conduct. O.C.G.A. § 45-19-29. These are:

1) to fail or refuse to hire, to discharge or otherwise to discriminate against any individual with respect to the individual's compensation, terms, conditions, or privileges of employment;

2) to limit, segregate, or classify employees in any way that would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect an individual's status as an employee;

3) to hire, promote, advance, segregate, or affirmatively hire an individual solely because of his or her race, color, religion, national origin, sex, disability, or age;

4) for an employer controlling apprenticeship or other training or retraining including on-the-job training programs to discriminate against an individual in admission to or employment in any program established to provide apprenticeship or other training or to discriminate by allowing admission or promotion to an apprenticeship program; and

5) to print or publish, or cause to be printed or published, a notice or advertisement relating to employment by such an employer indicating any preference, limitation, specification, or discrimination based on the protected categories except where such criteria constitute a bona fide occupational qualification ("BFOQ") for employment.

The statute clarifies the BFOQ provision indicating that it is not unlawful for an employer to hire and employ, or select an individual for a training program, on the basis of religion or national origin in such cases where religion or national origin constitutes a bona fide occupational qualification reasonably necessary for the normal functions of that employer's responsibilities.

There is also no prohibition against an employer observing the terms of a bona fide seniority system or bona fide employee benefit plan such as pension, retirement, or insurance plan that is not a "subterfuge to evade" the purposes of the Act.

Employers Covered: Applies only to public employment. Public employment includes state employees of departments, boards, bureaus, commissions, authorities, or other agencies that employ 15 or more employees within the state for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. O.C.G.A. § 45-19-22(5).

Remedies: The administrator of the Commission on Equal Opportunity has exclusive jurisdiction over any claim of any unlawful practice under the Fair Employment Practices Act (FEPA). O.C.G.A. § 45-19-41. Any party to a hearing before a special master may appeal any adverse final order. O.C.G.A. § 45-19-39(a). The petition for review is filed in the superior court of the county the alleged unlawful practice occurred or where the respondent resides. *Id.*

The FEPA outlines several categories of possible remedial action, O.C.G.A. § 45-19-38(c):

1) Hiring, reinstatement, or upgrading of employees with or without back pay, with the caveat that no back pay can be ordered for any period more than two years before the date of the filing of the complaint with the administrator. Interim earnings, unemployment benefits, workers' compensation benefits, or amounts earnable with reasonable diligence by the person or persons discriminated against operate to reduce the back pay otherwise allowable.

2) Admission or restoration of individuals to participate in a guidance, apprenticeship training, on-the-job training program, or other occupational or retraining education program including use of objective admission criteria for such programs.

3) The extension of full and equal enjoyment of the advantages, privileges, facilities, and services or the respondent.

4) Reporting on compliance.

5) Posting notices in conspicuous places in the respondent's place of operation in the form prescribed by the administrator or special master.

6) Restoration of other employment benefits not enumerated by the statute.

7) Recommending to the governor that the respondent be required to adopt and file with the administrator, within a specified time limitation, for the administrator's approval a plan to fill vacancies or hire new employees in a manner to eliminate or reduce imbalance in employment with respect to race, color, disability, religion, sex, national origin, or age.

Although a special master is not expressly authorized by the FEPA to award attorney's fees, the statute implicitly authorizes a special master to award reasonable attorney's fee to a successful FEPA claimant who actually incurred attorney's fees. The basis of such an award is that a monetary award under the FEPA is for actual damages only and only attorney's fees actually incurred constitute actual damages. *Finney v. Dep't of Corrections*, 263 Ga. 301 (1993).

b. <u>The Georgia Equal Pay for Equal Work Act</u>

Sex Discrimination: The Georgia Equal Pay for Equal Work Act prohibits payment to one gender at a lower rate than another gender for comparable work on jobs that require the same or essentially the same knowledge, skill, effort, and responsibility. O.C.G.A. § 34-5-3(a).

Employers Covered: The Act is applicable to those employers who have 10 or more employees. O.C.G.A. § 34-5-2(4).

The act does exclude pay structures based upon (1) a seniority system, (2) a merit system, (3) a system which measures earnings by quantity or quality of production, or (4) a differential based on any other factor other than sex. O.C.G.A. § 34-5-3(a).

Remedies: The Georgia Equal Pay for Equal Work Act provides three remedies that the aggrieved employee may seek: (1) arbitration; (2) administrative investigation by the Commissioner of Labor; or (3) direct suit in a court of competent jurisdiction. Any arbitration award is binding upon the parties, although either party has the right of appeal to the superior court within 30 days after the decision has been published. O.C.G.A. § 34-5-6.

Any employee can recover "the amount of unpaid damages" and the court may "allow costs of the action and a reasonable attorney's fee not to exceed 25 percent of the judgment to be paid by the defendant." O.C.G.A. § 34-5-5.

c. <u>The Georgia Age Discrimination in Employment Act</u>

Age Discrimination: The Georgia Age Discrimination in Employment Act (GADEA) prohibits discrimination against any individual between the ages of 40 and 70 years, solely upon the ground of age, when the reasonable demands of the position do not require such an age distinction. O.C.G.A. § 34-1-2(a).

The GADEA forbids compulsory retirement for anyone except those who fall within its narrow exceptions. The GADEA contains an executive exception to the ban on mandatory retirement. It does not prohibit compulsory retirement of any employee who has attained 65 years of age but not 70 years of age and who, for the two-year period immediately before retirement, is employed in a bona fide executive or a high policy-making position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least a specified amount. O.C.G.A. § 34-1-2(a).

Employers Covered: The GADEA applies to any person, firm association, or corporation carrying on or conducting within Georgia any business requiring the employment of labor.

Remedies: There is no private cause of action under the GADEA. *Calhoun v. Federal Nat. Mortg. Ass'n*, 823 F.2d 451 (11th Cir. 1987).

The only criminal penalty allowed is a misdemeanor "punished by a fine of not less than $100.00 nor more than $250.00." O.C.G.A. § 34-1-2(b).

d. The Georgia Equal Employment for Persons with Disabilities Code

Disability Discrimination: Disability discrimination is prohibited by the Georgia Equal Employment for Persons with Disabilities Code (Disabilities Code). O.C.G.A. § 34-6A-6. Subject to exceptions relating to the individual's ability to perform the job, employers are prohibited from taking the following actions because of a person's disability:

- Failure or refusal to hire;
- Discharge;
- Discrimination with respect to wages, rates, pay, hours, or other terms and conditions of employment; or
- Limiting, segregating, or classifying individuals with disabilities.

Disability definition: Disability means any condition or characteristic that renders an individual with disabilities but does not include either addiction to any drug, or illegal or federally controlled substance, or the use of alcohol. O.C.G.A. § 34-6A-2(1).

An individual with disabilities is any person who has a physical or mental impairment that substantially limits one or more major life activities and who has a record of impairment. O.C.G.A. § 34-6A-2(3). Pursuant to O.C.G.A. § 34-6A-2(7), a physical or mental impairment is:

- Any physiological disorder or condition or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory (including speech organs); cardiovascular; reproductive; digestive; genital and urinary; blood and lymphatic; skin; or hormonal.
- Intellectual disabilities and specific learning disabilities.

Pursuant to O.C.G.A. § 34-6A-2(5), major life activities include: caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, or working.

Employer Covered: All employers in Georgia with 15 or more employees.

Remedies: Under the Disabilities Code, any disabled individual aggrieved by an unfair employment practice may bring a civil action. O.C.G.A. § 34-6A-6.

The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, including but not limited to:

- Hiring, reinstatement, or upgrading of employees;
- Admission or restoration of the aggrieved individual to union membership;
- Admission to or participation in a guidance program, apprenticeship training program, on-the-job training program, or other occupational training or retraining program; or
- The use of training related criteria in the admission of individuals to such training programs and job-related criteria for employment.

Additionally, the court may award to the plaintiff back pay. The court may award court costs and reasonable attorney's fees to the prevailing party. O.C.G.A. § 34-6A-6(b).

9. Is there a common law or statutory prohibition of retaliation?

Yes, Georgia has several anti-retaliation provisions. The Georgia Equal Pay for Equal Work Act and the Georgia Equal

Employment for Persons With Disabilities Code, discussed *supra*, both prohibit retaliation. Additionally, Georgia has anti-retaliation provisions in connection with (1) whistleblowers in public employment and (2) court appearances or jury duty.

a. Retaliation in Connection with Discrimination Claims

Retaliation is prohibited by the Georgia Equal Pay for Equal Work Act and the Georgia Equal Employment for Persons With Disabilities Code. O.C.G.A. § 34-6A-5; O.C.G.A. § 34-5-3(c).

Georgia employers cannot discharge, expel, refuse to hire, or otherwise discriminate against any person or applicant for employment for: opposing any practice made unlawful by the statute; or participating in an investigation or other proceeding under the statute. O.C.G.A. § 34-6A-5.

Remedies: Any person who violates the Georgia Equal Pay for Equal Work Act "shall, upon conviction thereof, be punished by a fine not to exceed $100.00." O.C.G.A. § 34-5-3(c).

Under the Georgia Equal Employment for Persons With Disabilities Code, the court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, including but not limited to:

- Hiring, reinstatement, or upgrading of employees;
- Admission or restoration of the aggrieved individual to union membership;
- Admission to or participation in a guidance program, apprenticeship training program, on-the-job training program, or other occupational training or retraining program; or
- The use of training related criteria in the admission of individuals to such training programs and job-related criteria for employment.

Additionally, the court may award to the plaintiff back pay. The court may award court costs and reasonable attorney's fees to the prevailing party. O.C.G.A. § 34-6A-6(b).

b. Whistle Blowing

Georgia law protects public employees who disclose an alleged violation of or non-compliance with any federal, state, or local law, rule or regulation pertaining to the possible existence of any activity constituting fraud, waste, and abuse in or relating to any state programs or operations. Any public employee who reports a potential violation shall be free from discipline or reprisal from his employer, unless such disclosure was made with false and reckless disregard. O.C.G.A. § 45-1-4.

Employers Covered: Public employers.

c. Jury Duty/Court Attendance

It is unlawful to discharge, discipline, or otherwise penalize an employee because the employee is absent from his or her employment for the purpose of attending a judicial proceeding in response to a subpoena, summons for jury duty, or other court order or process which requires the attendance of the employee at the judicial proceeding. O.C.G.A. § 34-1-3(a).

Employers Covered: All Georgia employers.

Remedies: An employee who is disciplined or discharged in violation of this law may sue his employer or the agent of his employer for actual damages and reasonable attorneys' fees. O.C.G.A. § 34-1-3(b).

10. Is the state a deferral state for charges filed with EEOC?

No. Georgia is a non-deferral state.

11. Are there any state laws related to compensation, including wage and hour, paid time off, mandatory breaks, fringe benefits, allowable deductions, prevailing wage rates for public contracts, etc.?

Yes, Georgia has laws relating to minimum wage, wage payment, meal breaks, and child labor.

a. Minimum Wage

The minimum wage under the Georgia Minimum Wage Law is $5.15 per hour. O.C.G.A. § 34-4-3.

Covered Employers: The Georgia Minimum Wage Law does not apply to any employer subject to the minimum wage requirements under the FLSA. Employers subject to the FLSA must pay employees at least the federal minimum wage of $7.25 per hour.

Georgia employers not subject to the FLSA are generally subject to Georgia's minimum wage requirement except employers:

- With annual sales of $40,000 or less;
- With five employees or less;
- That hire domestic employees;
- That are farm owners, sharecroppers, or land renters; or
- Are granted an exemption by the Georgia Commissioner of Labor.

O.C.G.A. §§ 34-4-3 and 34-4-4.

Remedies: Covered employees may bring a private right of action in the Georgia Superior Court under this law for recovery of wages due, liquidated damages, costs, and reasonable attorneys' fees. O.C.G.A. § 34-4-6.

b. Wage Payment

Under Georgia law, wages must be paid on regular paydays at least twice a month. Paydays must divide the month into at least two equal pay periods. Employers in the farming, sawmill, and turpentine industries are exempt. Officials, superintendents, or other heads or subheads of a department within an employer's organization may be paid monthly at a stipulated salary. O.C.G.A. § 34-7-2.

Vacation Leave: There is no Georgia law addressing vacation leave. However, Georgia courts will uphold an employer's use-it-or-lose-it policies when they are clearly and unambiguously stated in the employee manual or a secondary source and have been explicitly or impliedly accepted by the employee. *Shannon v. Huntley's Jiffy Stores, Inc.*, 329 S.E.2d 208, 210 (Ga. Ct. App. 1985).

Covered Employers: All employers in Georgia are covered except for employers in farming industry, sawmill industry, or turpentine industry. O.C.G.A. § 34-7-2.

Remedies: There is no private right of action under this law. The GDOL, however, may request that the Georgia Attorney General or a district attorney prosecute a wage payment violation. O.C.G.A. § 34-2-12.

c. Deductions From Pay

There is no Georgia law addressing wage deductions. Under the Georgia Wage Payment Law (GWPL), employers must pay employees the full net amount of wages. O.C.G.A. § 34-7-2(b). The GWPL does not explicitly state how the full net amount of wages is calculated for each pay period.

d. Meal Breaks

All employers in Georgia employing minors under age 16 at a production or performance site must provide minors with:

- in every ten-hour shift, both a:
  - one hour break for meals; and
  - one additional hour for rest and recreation.
- In every shift that is greater than four hours, one hour for rest and recreation.
- Eight hours of rest between productions or performances and the minors' regular school hours upon their return to school following the production or performance.

Ga. Comp. R. & Regs. 300-7-1-.05

e. Child Labor

Under Georgia law, employers may not employ minors under the age of 16 in any hazardous occupation, during certain hours, or for more than a specified length of time each day.

O.C.G.A. §§ 39-2-1 to 39-2-7.

Covered Employers: All Georgia employers.

Remedies: There is no private right of action under this law. An employer who violates this law is guilty of a misdemeanor punishable by a fine up to $1,000 and/or confinement up to 12 months. O.C.G.A. § 39-2-20

12. Is there a state statute governing paid or unpaid leaves?

Yes, Georgia has statutory provisions requiring leave for military service, voting, jury duty, blood donation, bone marrow

donation, and organ donation. Leaves for blood donation, bone marrow donation, and organ donation only apply for public employees.

a. Military

Leave Time: An employee is entitled to leave during any period of military service. Military training or leave to attend service schools conduct by the US Armed Forced may not exceed a total of six months during any four-year period. O.C.G.A. § 38-2-280(b).

Eligible Employees: All non-temporary employees who perform military service for Georgia, another state, or the US under orders issued by the state or federal authority are eligible for leave under O.C.G.A. §§ 38-2-280(b) to (d). The statute specifically extends benefits to any person who:

- Leaves his position (other than a temporary position) for a short period of time to participate in assemblies or annual training by the Georgia organized militia or to attend service schools conducted by the US armed forces for up to six months;
- Serves as a member of the organized militia or reserves of the US armed forces;
- Serves as a member of the Georgia National Guard and who is called into active state service; or
- Serves as a member of another state's National Guard and who is called into state-sponsored active duty by that state's governor.

Covered Employers: All Georgia private employers.

Notice: To be reinstated after taking military leave, the employee must: (1) apply for reemployment within 90 days of service; (2) be qualified to perform the duties of the position; and (3) submit a certificate of completion of military service. O.C.G.A. § 38-2-280(a)

If the employee is being reinstated following a temporary leave for military training, the employee must apply for reemployment within ten days after completion of the training. O.C.G.A. § 38-2-280(b).

Remedies: A covered employee may petition the superior court of the county where the employer resides for actual damages and injunctive relief. O.C.G.A. § 38-2-280(f).

b. Voting

Leave Time: An employee may take time off to vote in any municipal, county, state, or federal political party primary or election where the employee is registered and qualified to vote. Employees may take up to two hours of work time to vote. However, if the employee's work hours start at least two hours after the polls open or end at least two hours before the polls close, the employee is not entitled to time off. The employer may specify the hours during which the employee may be absent. O.C.G.A. § 21-2-404.

Covered Employers: All Georgia private employers.

Remedies: The statute does not specify a private right of action. An employer violating this statute is guilty of a misdemeanor. O.C.G.A. § 321-2-598.

c. Jury duty

Leave Time: An employee may be absent from his employment because of a subpoena, summons for jury duty, or other court order of process requiring the employee's attendance. O.C.G.A. § 34-1-3(a). The statute does not specify an amount of leave that may be taken each year.

Notice: An employer may require an employee to follow its rules requiring reasonable notice about the expected absence or delay in reporting to work because of the judicial proceeding. O.C.G.A. § 34-1-3(c).

Employers Covered: All Georgia employers.

Remedies: An employee who is disciplined or discharged in violation of this law may sue his employer or the agent of his employer for actual damages and reasonable attorneys' fees. O.C.G.A. § 34-1-3(b).

d. Blood Donation

Leave Time: An employee may take time off during work hours to donate blood, blood platelets, or granulocytes (white blood cells) through the plasmapheresis process. For blood donation, employees must be afforded a maximum of eight hours of leave time per year, representing two hours per donation, up to four times per year. Employees who donate blood platelets or granulocytes must be afforded a maximum of 16 hours of leave time per year, representing four hours per

donation, up to four times per year. O.C.G.A. § 45-20-30.

Notice: Employees must request and receive advance approval from their supervisor to be away from the work area, and supervisors may schedule this time off based on the needs of the organization.

Employers Covered: State and local government employers.

e. Organ Donation

Leave Time: A paid leave of absence for 30 calendar days must be granted to employees who donate an organ for transplantation. O.C.G.A. § 45-20-31(a).

Notice: Employees requesting leave to donate an organ must provide to their supervisor or other designated official a statement from the medical practitioner performing the transplant or from the hospital administrator certifying that the employee is donating an organ for transplantation.

Employers Covered: State employers.

f. Bone Marrow Donation

Leave Time: A paid leave of absence for 7 calendar days must be granted to employees who donate bone marrow for transplantation. O.C.G.A. § 45-20-31(b).

Notice: Employees requesting leave to donate bone marrow must provide to their supervisor or other designated official a statement from the medical practitioner performing the transplant or from the hospital administrator certifying that the employee is donating bone marrow for transplantation. If the bone marrow donation does not take place, the absence will be charged to accrued leave, personal leave, compensatory time, or unpaid leave.

Employers Covered: State employers.

13. Is there a state law governing drug-testing?

Georgia has no laws directly prohibiting or regulating drug testing in private employment. The state does have a drug-free workplace statutory program that enables private employers to receive a discount on workers' compensation insurance if the employer complies with the statutory provisions. Additionally, Georgia has statutes regulating testing in public employment.

a. Drug-Free Workplace: O.C.G.A. §§ 34-9-410 to 34-9-421

The Georgia courts and the Georgia legislature have not created any laws directly prohibiting or regulating private employer drug testing in Georgia. However, Georgia's workers' compensation law establishes standards and procedures for drug-free workplace programs. If an employer implements a drug-free workplace program in compliance with the statute, the employer may qualify for certification for a premium discount under its workers' compensation insurance policy (O.C.G.A. § 34-9-412).

To qualify for the workers' compensation premium discount, the employer must require testing for drugs and alcohol (O.C.G.A. § 34-9-413). Alcohol is defined as "ethyl alcohol, hydrated oxide of ethyl, or spirits of wine, from whatever source or by whatever process produced." O.C.G.A. § 34-9-411(1). Drug means "amphetamines, cannabinoids, cocaine, phencyclidine (PCP), methadone, methaqualene, opiates, barbiturates, benzodiazepines, propoxyphene, or a metabolite of any such substance." The employer may test an individual for any or all of these. O.C.G.A. § 34-9-411(4).

Employers Covered: The statute applies to all persons or private entities subject to the provisions of Georgia's workers' compensation laws (O.C.G.A. § 34-9-411(7)). There is no minimum number of employees required for coverage.

Qualifying for Discount: To qualify for the workers' compensation insurance premium discount, an employer must pursuant to O.C.G.A. § 34-9-415(b)

- Require job applicants to submit to testing following an offer of employment
- Require an employee to submit to reasonable suspicion testing
- Require an employer to submit to a substance abuse test, if the test is conducted as part of a routinely scheduled employee fitness-for-duty medical examination that is either:
  - part of the employer's established policy; or
  - scheduled routinely for all members of an employment classification or group.
- Require an employee to submit to follow-up substance abuse testing following the employee's entrance into an employee assistance program (EAP) or rehabilitation program as the result of a positive test. If the employee voluntarily enters a program, follow-up testing is not required.
- Require an employee to submit to substance abuse testing following the employee causing or contributing to an

on-the-job injury resulting in lost work time.

In addition, random testing is allowed but not required to qualify for the discount. O.C.G.A. § 34-9-415(c). Although the employer must require the testing described above to qualify for the discount, there is no legal duty in Georgia for an employer to request or require an applicant or employee to undergo substance abuse testing.

Failing or Refusing to Take Test: To qualify for the workers' compensation premium discount, if an applicant's or employee's drug test comes back positive, the employer must pay for a confirmation test that must be different in scientific principle from that of the initial test procedure. O.C.G.A. §§ 34-9-411(3) and 34-9-415(d)). The confirmation method must be capable of providing the required specificity, sensitivity, and quantitative accuracy. O.C.G.A. § 34-9-411(3).

To qualify for the workers' compensation premium discount under the statute, the employer must provide the employee or job applicant with written notice that the employee or applicant may contest or explain the results of a positive test result within 5 working days after written notification of a positive test. O.C.G.A. § 34-9-414(a)(6).

Test results are required to be kept confidential and may only be released under a written consent form signed voluntarily by the person tested. An exception exists where a release is compelled by an agency of the state or court of competent jurisdiction, or is deemed appropriate by a professional or occupational licensing board in a related disciplinary proceeding. O.C.G.A. § 34-9-420(b).

Cost: To qualify for the workers' compensation premium discount under the statute, the employer must pay the cost of the initial and confirmation drug tests required by the employer. The employee or applicant must pay the cost of any additional drug tests not required by the employer. O.C.G.A. § 34-9-415(d)(10), (11).

b. Drug Testing For State Employment: O.C.G.A. §§ 45-20-110 to 45-20-111

The state may designate certain positions as requiring a drug test. For such positions, the employer must require applicants to submit to testing prior to commencing employment or within ten days after commencing employment. O.C.G.A. § 45-20-111(b).

The employer may test for marijuana/cannabinoids (THC), cocaine, amphetamines/ methamphetamines, opiates, or phencyclidine (PCP). Employers may not test for any drug used that is validly prescribed or when used as otherwise authorized by state or federal law. O.C.G.A. § 45-20-110(3).

Employers Covered: The statute applies to any agency, department, commission, bureau, board, college, university, institution, or authority of any branch of state government offering public employment. The statute does not specify a minimum number of employees required for coverage.

Failing or Refusing to Take Test: If an employee's drug test comes back positive, the test must be followed by a confirmatory test using gas chromatography/mass spectrometry analysis. If the results of the confirmatory test indicate the presence of illegal drugs, a medical review officer must review and interpret the results to determine if there is an alternative medical explanation. If the applicant ultimately fails the drug test, the applicant must be disqualified from employment with the state for a specified period of time. O.C.G.A. § 45-20-111(b).

Employers must disqualify any applicant offered employment who refuses to submit to an established test for illegal drugs or whose test results are positive. Employers must continue to disqualify the applicant from employment for two years from the date that the drug test was administered or offered, whichever is later. O.C.G.A. § 45-20-111(b).

Cost: All costs of testing must be paid from public funds by the employing agency or unit of state government. O.C.G.A. § 45-20-111(b).

c. Random Drug Testing of Employees in High-Risk Jobs: O.C.G.A. §§ 45-20-90 to 45-20-93

Public employees working high-risk jobs must be subjected to random testing for evidence of use of illegal drugs. O.C.G.A. § 45-20-91.

Employers may test for marijuana, a controlled substance as defined in O.C.G.A. § 16-13-21(4), a dangerous drug as defined in O.C.G.A. § 16-13-71, and any other illegal drug or controlled substance. Employers may not test for any drug used that is validly prescribed or when used as otherwise authorized by state or federal law. O.C.G.A. § 45-20-90(4).

Employers Covered: The statute applies to any state agency, department, commission, board, bureau, or authority offering employment in "high-risk" work as a peace officer (as defined under O.C.G.A. § 35-8-2). High-risk work includes duties where inattention or errors in judgment while on duty has the potential for significant risk of harm to the employee, other employees, or the general public (O.C.G.A. § 45-20-90(3)). The statute also applies to certified public employees

working under a personnel contract to provide personnel services, including medical, security, or transportation services to a state or other public agency (O.C.G.A. §§ 45-20-90(1)). The statute does not specify a minimum number of employees required for coverage.

Failing or Refusing to Take Test: Employers must terminate any employee conducting high-risk work who tests positive for an illegal drug or who refuses to provide body fluid specimens when requested to do so. O.C.G.A. § 45-20-93. Any applicant offered employment that refuses to submit to an established test for illegal drugs or whose test results are positive must be disqualified from employment by the state. The applicant will remain disqualified for two years from the date that the test was administered or offered, whichever is later.

Cost: Statute does not specify the party responsible for paying.

14. Is there a medical marijuana statute?

Yes, on April 16, 2015, Georgia enacted a bill known as "Haleigh's Hope Act" (O.C.G.A. §§ 16-12-190 to 16-12-191, 31-2A-18, 31-50-1 to 31-50-5, 31-51-1 to 31-51-10, and 51-1-29.6).

Georgia's law permits patients suffering from certain illnesses—including cancer, Crohn's disease, mitochondrial disease, amyotropic lateral sclerosis, multiple sclerosis, Parkinson's disease, seizure disorders and sickle cell disease—to possess up to 20 ounces of "low THC oil," which is defined as an oil that contains no more than 5% by weight of tetrahydrocannabinol and an amount of cannabidiol equal to or greater 30 than the amount of tetrahydrocannabinol. (O.C.G.A. §§ 16-12-190, 16-12-191, and 31-2A-18).

Georgia's law does not require employers to accommodate medical marijuana users or permit the use of marijuana in the workplace. O.C.G.A. § 16-12-191(f).

15. Is there trade secret / confidential information protection for employers?

Yes. Georgia has adopted the Georgia Trade Secrets Act (GTSA), which is based in large part on the Uniform Trade Secrets Act. O.C.G.A. §§ 10-1-760 to 10-1-767. Georgia also has a criminal trade secret theft statute that provides for imprisonment, fines or both. O.C.G.A. § 16-8-13

To prove a trade secret misappropriation claim, a plaintiff must show each of the following:

- The existence of a trade secret.
- The defendant misappropriated the trade secret.

Trade Secret Defined: Both the GTSA and Georgia's criminal trade secret theft statute define "trade secret" as information that both: (1) includes the following: technical or nontechnical data, a formula, a pattern, a compilation, a program, a device, a method, a technique, a drawing, a process, financial data, financial plans, product plans, or a list of actual or potential customers or suppliers which is not commonly known by or available to the public; and (2) (a) derives economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. O.C.G.A. §§ 10-1-761(4) and 16-8-13(a)(4).

Misappropriation: A trade secret can be misappropriated by (1) acquisition, (2) disclosure, or (3) use. O.C.G.A. § 10-1-761(2).

- Acquisition as Misuse: A trade secret can be misappropriated when the acquirer knows or has reason to know that the trade secret was acquired by improper means. O.C.G.A. § 10-1-761(2)(A)
- Disclosure as Misuse: Disclosure or use of another's trade secret without express or implied consent can constitute misappropriation when the person either:
- Used improper means to acquire knowledge of the trade secret.
- At the time of disclosure or use, knew or has reason to know, that the trade secret was:
    - derived from a person who used improper means to acquire it;
    - acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
    - derived from a person who owed a duty to maintain its secrecy or limit its use.
- Before a material change of his position, knew or had reason to know:
    - the information was a trade secret; and
    - that knowledge of the information had been acquired by accident or mistake.

O.C.G.A. § 10-1-761(2)(B).

Remedies: Under the GTSA, potential relief may include:

- Monetary damages: Including actual loss caused by the misappropriation or unjust enrichment not taken into account when calculating actual loss. O.C.G.A. § 10-1-763.
- A reasonable royalty: A court may order the defendant to pay a reasonable royalty when actual damages or unjust enrichment cannot be proved by a preponderance of the evidence. O.C.G.A. § 10-1-763(a). In exceptional circumstances where the court determines it would be unreasonable to enjoin a defendant's misappropriating use, the court may issue an injunction conditioning the defendant's use on the payment of a reasonable royalty. O.C.G.A. § 10-1-762(b).
- Attorneys' fees: A court may award attorneys' fees if:
  - the misappropriation claim is made in bad faith;
  - a motion to terminate an injunction is made or resisted in bad faith; or
  - willful and malicious misappropriation exists.

O.C.G.A. § 10-1-764.

- Exemplary damages: A court may award exemplary damages if the plaintiff shows that willful and malicious misappropriation exists. Exemplary damages cannot be more than twice the amount of actual damages and unjust enrichment. O.C.G.A. §10-1-763(b).
- Injunctive relief: Actual or threatened misappropriation may be enjoined. The injunction will last as long as the trade secret exists, but may be extended to prevent any unjust advantage, including:
  - a commercial advantage obtained from the misappropriation; or
  - an advantage that exists because the trade secret lapsed at the fault of the enjoined party.

O.C.G.A. § 10-1-762(a)

- Affirmative acts: In appropriate circumstances, the court may compel affirmative acts to protect a trade secret. O.C.G.A. § 10-1-762(c).

16. Is there any law related to employee's privacy rights?

Georgia law recognizes an invasion of privacy tort. *See supra* topic 7. Additionally, the state has laws relating to the disclosure of certain medical information and surveillance/tracking.

a. Medical history

Georgia law prohibits any person or legal entity which receives AIDS confidential information or which is responsible for recording, reporting, or maintaining AIDS confidential information from:

- intentionally or knowingly disclosing that information to another person or legal entity; or
- Being compelled to disclose that information to another person or legal entity by subpoena, court order; or other judicial process.

O.C.G.A. § 24-12-21(b).

AIDS confidential information means information that permits the identification of a person and that discloses that a person has been diagnosed as having AIDS, been or is being treated for AIDS, been determined to be infected with HIV, submitted to an HIV test, had a positive or negative result from an HIV test, sought and received counseling regarding AIDS, or been determined to be a person at risk of being infected with AIDS. O.C.G.A. § 31-22-9.1(2).

Covered Employers: All persons or legal entities that receive AIDs confidential information.

Remedies: This law does not specify whether aggrieved employees have a private right of action. However, Georgia case law suggests that injured employees may have a private right of action. *See Doe v. Hall*, 579 S.E. 2d 838 (Ga. Ct. App. 2003).

b. Surveillance and Tracking

Georgia law prohibits any person from, among other things, using any device to observe, photograph, or record another person's activities in any private place that is out of public view without the consent of that person. O.C.G.A. § 16-11-62.

Pursuant to O.C.G.A. § 16-11-62, however, it is not unlawful to use any device to observe, photograph, or record another person's activities:

- If the person is incarcerated in any jail, correctional institution, or other facility and is charged with or has been convicted of the commission of a crime, except for the incarcerated person's discussions with his attorney;
- For the purpose of security or crime prevention by an owner or occupier of real property in an area where there is no

reasonable expectation of privacy;
- For the purpose of security or crime prevention if the person is within the curtilage of the residence of the person using the device; or
- If the person using the device is a law enforcement officer or his agent in the lawful performance of his official duties.

Therefore, Georgia employers do not violate this statute if they have a legitimate security interest in conducting video surveillance and only monitor common work areas where employees have no expectation of privacy.

c. Search of Privately-Owned Locked Vehicles: O.C.G.A § 16-11-135

Georgia law prohibits employers or their agents from establishing, maintaining, or enforcing a policy or rule that allows the employer to search the locked, privately-owned vehicles of employees or invited guests in the employer's parking lot, with certain exceptions. O.C.G.A. § 16-11-135(a).

This code provision does not apply (a) if the vehicle is owned or leased by the employer, (b) in any situation in which a reasonable person would believe that accessing a locked employee's vehicle is necessary to prevent an immediate threat to human health, life, or safety, or (c) when an employee consents to a search by a licensed private security officer for loss prevention purposes based upon probable cause that the employee unlawfully possesses employer property. O.C.G.A. § 16-11-135(c).

Employers who violate this law may face criminal prosecution by the Georgia attorney general. O.C.G.A. § 16-11-135(i).

17. Is there any law restricting arbitration in the employment context?

Under the Georgia Arbitration Code, all signatories to an employment contract must initial the arbitration clause. O.C.G.A. § 9-9-2(c)(9).

18. Is there any law governing weapons in the employment context?

Yes, Georgia has a guns-at-work law.

An employer cannot make it a condition of employment that a prospective employee agree not to store firearms/ammunition locked out of sight in the employee's private vehicle while parked in the employer's parking lot, if the employee possess a Georgia weapons carry license. O.C.G.A. § 16-11-135(b). This provision does not apply, *inter alia*, (1) to an employer providing applicable employees with a secure parking area which restricts general public access through the use of a gate, security station, security officers, or other similar means which limit public access into the parking area, provided that any employer policy allowing vehicle searches upon entry shall be applicable to all vehicles entering the property and applied on a uniform and frequent basis; or (2) to an employee who is restricted from carrying or possessing a firearm on the employer's premises due to a completed or pending disciplinary action.

An employer has immunity from criminal or civil actions based upon its compliance with Georgia's guns-at-work law.

19. Miscellaneous employment or labor laws not discussed above?

a. Restrictive Covenants

Statutory Provision: Georgia's Restrictive Covenants in Contracts law governs restrictive covenants entered into after May 11, 2011 (O.C.G.A. §§ 13-8-2 and 13-8-50 to 13-8-59). Contracts entered into before the statute's effective date are analyzed under O.C.G.A. § 13-8-2 and Georgia common law.

Non-Compete Provisions (after May 11, 2011): Pursuant to O.C.G.A. § 13-8-53(a), non-compete agreements entered after May 11, 2011, that restrict competition *during* the term of employment are enforceable if the restrictions are reasonable in (1) time, (2) geographic area, and (3) scope.

A non-compete *during* the term of the relationship are not unreasonable even if it lacks "specific limitation upon scope of activity, duration, or geographic area" if it (1) promotes or protects the purpose of the agreement, or (2) deters potential conflict of interest. O.C.G.A. § 13-8-56(4).

Non-competes *after* the term of employment are only enforceable against employees who, O.C.G.A. § 13-8-53(a)

- Customarily and regularly solicit for the employer customers or prospective customers;
- Customarily and regularly engage in making sales or obtaining orders or contracts for products or services to be performed by others;
- Perform the following duties:
    - have a primary duty of managing the enterprise in which the employee is employed or of a customarily

recognized department or subdivision;
    - customarily and regularly direct the work of two or more other employees; and
    - have the authority to hire or fire other employees or have particular weight given to suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees.
- Perform the duties of a key employee or professional.

Georgia's Restrictive Covenants in Contracts law includes rebuttal presumptions relating to the "reasonableness" of restraints:

1. Time Restriction

For a non-compete against an employee not associated with the sale of a business, two years or less is presumed reasonable, and more than two years is presumed unreasonable. O.C.G.A. § 13-8-57(d).

For a non-compete against the seller of a business, the longer of (i) five years or (ii) the period of time during which payments are being made is presumed reasonable. O.C.G.A. § 13-8-52(d).

2. *Geographic Area* (O.C.G.A. § 13-8-53(c))

Any description that provides "fair notice of the maximum reasonable scope of the restraint" is presumed reasonable, even if "generalized" or "could be stated more narrowly".

A "good faith estimate" of the geographic area applicable at time of termination is presumed reasonable even if the estimate is capable of including or includes "extraneous geographic areas."

The phrase "the territory where is employee is working at the time of termination" or similar language is presumed reasonable if the employee can "reasonably determine the maximum reasonable scope of the restraint at the time of termination."

3. *Scope* (O.C.G.A. §§ 13-8-53(c) and 13-8-56(3)):

The scope of competition restricted is presumed reasonable if it is "measured by the business of the Employer."

The following descriptions of scope of competitive activities, products, or services are presumed reasonable:

- Activities, products, or services "same or similar to" those of employer
- Any description that provides "fair notice of the maximum reasonable scope of the restraint" sufficient even if "generalized" or "could be stated more narrowly"
- "Good faith estimate" of activities, products or services applicable at time of termination is sufficient even if the estimate is capable of including or includes "extraneous matters"
- Activities, products, or services shall be sufficiently described if reference to the activities, products, or services is provided and qualified by the phrase "of the type conducted, authorized, offered, or provided within two years prior to termination" or similar language

The covenant will be construed only to cover so much of the "estimate" as relates to the "activities actually conducted" or "products or services actually provided."

Non-Solicitation Provisions (after May 11, 2011): An employee may agree to refrain from soliciting or attempting to solicit, directly or indirectly by assisting others, any business from employer's customers, or actively seeking prospective customers, with whom the employee had "material contact" for purpose of providing products or services competitive with employer's business. O.C.G.A. § 13-8-53(d).

"Material contract" means the contact between an employee and each customer or potential customer (O.C.G.A. § 13-8-51(10)):

- With whom or which the employee dealt on behalf of the employer;
- Whose dealings with the employer were coordinated or supervised by the employee;
- About whom the employee obtained confidential information in the ordinary course of business as a result of such employee's association with the employer; or
- Who receives products or services authorized by the employer, the sale or provision of which results or resulted in compensation, commissions, or earnings for the employee within two years prior to the date of the employee's termination.

Parties Pursuant to O.C.G.A. § 13-8-52, restrictive covenants may exist or be ancillary to contracts between:

- Employers and employees;
- Distributors and manufacturers;
- Lessors and lessees;
- Partnerships and partners;
- Employers and independent contractors;
- Franchisor and franchisees;
- Sellers and purchasers of a business; and
- Two or more employers

Blue Penciling: If a covenant does not comply with Georgia's Restrictive Covenants in Contracts law, the court "may" modify the restraint and grant only the relief "necessary" to (1) protect all legitimate business interest of person seeking enforcement and (2) achieve the original intent of the contracting parties to the extent possible. O.C.G.A. §§ 13-8-53(d) and 13-8-54.

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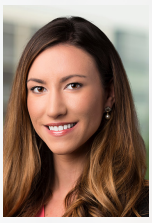
By: Matt Walters and Jackie Gans



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1. Is the state generally an employment-at-will state?

Yes:

> It is hereby declared to be the public policy of the state of Idaho, in order to maximize individual freedom of choice in the pursuit of employment and to encourage an employment climate conducive to economic growth, that the right to work shall not be subject to undue restraint or coercion. The right to work shall not be infringed or restricted in any way based on membership in, affiliation with, or financial support of a labor organization or on refusal to join, affiliate with, or financially or otherwise support a labor organization.

Idaho Code Ann. § 44-2001.

2. Are there any statutory exceptions to the employment-at-will doctrine?

There are no Idaho statutory exceptions to the employment-at-will doctrine.

3. Are there any public policy exceptions to the employment-at-will doctrine?

Yes, there are exceptions to the at-will doctrine – public policy, implied contract and covenant of good faith and fair dealing.

4. Is there any law related to the hiring process?

Under the Idaho Human Rights Act, employers may not make inquiries of or impose qualifications on prospective employees because of race, color, religion, sex, age (40 and over), national origin, or disability, unless based on a bona fide occupational qualification (BFOQ). There is no recognized BFOQ exception for race or color under Idaho law. The law applies to all public employers and to private employers with five or more employees. *See* I.C. § 67-5901 et seq.

Idaho law is silent with respect to the below examples except where otherwise noted.

a. Immigration

b. Recruitment/Advertisement

c. Applications

d. Background

e. Credit history

> Employers who use outside organizations to conduct background checks must comply with the federal Fair Credit Reporting Act, which requires certain disclosures and reports to be made available to applicants.

f. Medical history

g. Employment history

h. Notification to unsuccessful applicants

i. Offers of employment

5. Does the state recognize implied employment contracts under employment handbooks, policies, or practices?

While there is no statutory basis for recognizing implied employment contracts, case law nonetheless indicates that Idaho law does recognize implied employment contracts. In Idaho, "the lack of a written, express employment agreement does not mean that there was not a contract." *Parker v. Boise Telco Fed. Credit Union*, 129 Idaho 248, 251, 923 P.2d 493, 496 (Ct. App. 1996). The Idaho Court of Appeals has explained:

> A limitation on the at-will relationship may be express or implied. *Mitchell, supra*; *Metcalf, supra*. A limitation will be implied when, from all the circumstances surrounding the relationship, a reasonable person could conclude that both parties intended that either party's right to terminate the relationship was limited by the implied-in-fact agreement. *Mitchell, supra; Metcalf, supra*. Furthermore, the presumption of an at-will employment relationship can be rebutted when the parties intend that an employee handbook or manual altering that relationship will constitute an element of an employment contract. *Mitchell, supra; Metcalf, supra*. Whether a particular handbook does so may be a question of fact, unless the handbook "specifically negates any intention on the part of the employer to have it become a part of the employment contract." *Mitchell*, 125 Idaho at 712-13, 874 P.2d at 523-24; *Metcalf*, 116 Idaho at 625, 778 P.2d at 747.

Id.

6. Does the state have a right to work law or other labor / management laws?

It is hereby declared to be the public policy of the state of Idaho, in order to maximize individual freedom of choice in the pursuit of employment and to encourage an employment climate conducive to economic growth, that the right to work shall not be subject to undue restraint or coercion. The right to work shall not be infringed or restricted in any way based on membership in, affiliation with, or financial support of a labor organization or on refusal to join, affiliate with, or financially or otherwise support a labor organization.

Idaho Code Ann. § 44-2001 (West)

7. What tort claims are recognized in the employment context?

a. Intentional Infliction of Emotional Distress

> A claim for intentional infliction of emotional distress has been recognized in Idaho in the employment context. *See Bollinger v. Fall River Rural Elec. Co-op., Inc*., 152 Idaho 632, 643, 272 P.3d 1263, 1274 (2012).
>
> To recover on a claim of IIED, the plaintiff must show that: (1) the defendant's conduct was intentional or reckless, (2) the conduct was extreme and outrageous, (3) there was a causal connection between the conduct and the emotional distress, and (4) the emotional distress was severe. *Nation v. State Dep't of Correction*, 144 Idaho 177, 192, 158 P.3d 953, 968 (2007). To support an IIED claim, conduct must be more than merely "unjustifiable," but rather must rise to the level of "atrocious" behavior "beyond all possible bounds of decency." *Edmondson v. Shearer Lumber Prod*., 139 Idaho 172, 180, 75 P.3d 733, 741 (2003).
>
> In *Bollinger*, the Court concluded that the trial court properly granted summary judgment in favor on the employer on Bollinger's IIED claim. The Court reasoned that "Bollinger was an at-will employee, so the simple fact that she was discharged without cause cannot constitute extreme and outrageous behavior. Further, although Bollinger's discharge was abrupt and the time she was given to pack her office relatively rushed, such conduct is not atrocious or beyond all possible bounds of decency. In fact, escorting an employee who has just been terminated from the building in a timely fashion is an acceptable means to minimize disruption in the workplace." *Bollinger*, 152 Idaho at 643, 272 P.3d at 1274.

b. Negligent Infliction of Emotional Distress (NIED)

> "A claim for NIED is not *automatically* precluded simply because it arises in the context of an employment decision." *Walker v. City of Pocatello*, No. 4:15-CV-0498-BLW, 2016 WL 3976550, at *3 (D. Idaho July 20, 2016) (emphasis in original) (*citing to Frogley v. Meridian Joint Sch. Dist. No. 2*, 314 P. 3d 613, 625 (Idaho 2013) (summary judgment denied for NIED in context of retaliation claim).
>
> In *Bollinger v. Fall River Rural Elec. Co-op., Inc*., 272 P. 3d 1263, 1273 (Idaho 2012), the Idaho Supreme Court granted summary judgment in that case, not because an NIED claim in an employment setting is inherently deficient, but because the plaintiff failed to establish that a "duty" was owed to the plaintiff, which is the first element of an NIED claim. An NIED claim requires a showing of "(1) a legally recognized duty, (2) a breach of that duty, (3) a causal connection between the defendant's conduct and the breach, and (4) actual loss or damage." *Bollinger v. Fall River Rural Elec. Co-op., Inc*., 272 P. 3d 1263, 1273 (Idaho 2012).

c. Harassment/Assault/Battery

The Idaho Supreme Court has held that an employee "may maintain a civil action against the employer for injuries that were allegedly caused by an intentional tort of the employer during the course of employment." *Kearney v. Denker*, 114 Idaho 755, 756, 760 P.2d 1171, 1172 (1988). Typically, the Idaho worker's compensation law provides the exclusive remedy for injuries arising out of and in the course of employment. I.C. §§ 72-201, 72-209 and 72-211; *Wilder v. Redd,* 111 Idaho 141, 142, 721 P.2d 1240, 1241 (1986); *Yeend v. United Parcel Service, Inc.,* 104 Idaho 333, 334, 659 P.2d 87, 88 (1983). However, there is an exception from this general rule "in any case where the injury or death is proximately caused by the willful or unprovoked physical aggression of the employer, its officers, agents, servants or employees." I.C. § 72-209(3). Thus, by filing a worker's compensation claim, the employee does not waive any right she had to file a civil action against the employer. *Kearney v. Denker*, 114 Idaho 755, 756, 760 P.2d 1171, 1172 (1988).

d. Invasion of Privacy

In *Arnold v. Diet Ctr., Inc*., an employee sued his employer for wrongful termination of employment contract, defamation, and invasion of privacy. 113 Idaho 581, 585–86, 746 P.2d 1040, 1044–45 (Ct. App. 1987). On appeal, one of the issues before the Court of Appeals was whether, "as a result of post-termination publication of the reason for his discharge, was Arnold defamed and was his privacy invaded?" *Id*., 113 Idaho at 583, 746 P.2d at 1042. The employee alleged that disclosure of why he was terminated constituted an invasion of his privacy. But aside from one conversation between a manager and another employee, "there was no showing by [the employee] of any release of information by [the employer] concerning his termination." *Id*., at 586, 1045. The Court of Appeals concluded that the trial court did not err in granting summary judgment in dismissing the invasion of privacy claim.

e. Fraud

Idaho courts have indicated that fraud could be one potential basis for an employee to avoid an employment agreement. *Cantwell v. City of Boise*, 146 Idaho 127, 135, 191 P.3d 205, 213 n.4 (2008) ("Cantwell expressly agreed to these conditions in the June 17 Memorandum. Cantwell presents no reason why this document does not form part of the employment contract. Nor does he provide any grounds for avoiding this agreement, such as duress, fraud, or lack of consideration. As such, there is no reason to find that Cantwell was not bound to comply with the terms of this agreement.")

8. Is there a common law or statutory prohibition against discrimination / hostile work environment?

Yes, Idaho Code Section 67-5905 makes it a "prohibited act" for an employer to fail or refuse to hire, discharge, or otherwise discriminate with respect to compensation or terms of employment because of, or on a basis of, race, color, religion, sex or national origin, age, or disability.

Any person who believes he or she has been subject to unlawful discrimination may file a complaint under oath with the Idaho Human Rights Commission stating the facts concerning the alleged discrimination within one (1) year of the alleged unlawful discrimination. I.C. § 67-5907. A complaint must be filed with the Commission as a condition precedent to litigation. A complainant may file a civil action in district court within ninety (90) days of issuance of the notice of administrative dismissal pursuant to section 67-5907(6), Idaho Code. I.C. § 67-5908(2). In any civil action under this chapter, the burden of proof shall be on the person seeking relief. I.C. § 67-5908(5).

Several cities in Idaho, including Boise, Sandpoint, Coeur d'Alene, Ketchum, Moscow, and Pocatello, have passed ordinances prohibiting discrimination in employment on the basis of sexual orientation and gender identity or expression.

An applicant's military experience is generally an acceptable pre-employment inquiry, though the type of discharge applicant received has been characterized by the Idaho Department of Labor as "unwise or unacceptable." *See A Guide to Lawful Applications and Interviews*, Idaho Dept. of Labor, Human Rights Commission (November 2013).

In cases where an action is brought in the name of the Commission, that matter "shall be heard by the district court unless either party shall move for a jury trial." I.C. § 67-5908(1).

Regarding attorney fees, Title 67, Chapter 59 does not provide an express avenue to recover such fees. *Stout v. Key Training Corp.*, 144 Idaho 195, 198, 158 P.3d 971, 974 (2007) ("[T]he Idaho legislature chose not to include attorney fees in its remedy provision. No language in the Idaho Human Rights Act indicates that the legislature contemplated remedies which go toward the legal expense of enforcing the act.").

9. Is there a common law or statutory prohibition of retaliation?

a. Discrimination Claims

The Idaho Human Rights Act prohibits retaliation for opposing discriminatory practices. I.C. § 67-5911. This provision, however, does not allow for individual liability for an employer's agents or employees. *Foster v. Shore Club Lodge, Inc.*, 127 Idaho 921, 908 P.2d 1228 (1995).

b. Workers' Compensation Claims/ Jury Duty

In Idaho, unless otherwise agreed, employment is at will and employers or employees are free to terminate the employment relationship at any time, with or without cause. An exception to this doctrine is that "an employer may be liable for wrongful discharge when the motivation for discharge contravenes public policy." *Edmondson v. Shearer Lumber Products,* 139 Idaho 172, 176, 75 P.3d 733, 737 (2003). Terminating an employee because he or she files a worker's compensation claim or for serving on jury duty would violate the public policy exception to the at-will employment doctrine. *Sorensen v. Comm Tek, Inc*., 118 Idaho 668, 799 P.2d 74 (1990).; *see also Paolini v. Albertson's Inc.*, 143 Idaho 547, 557, 149 P.3d 822, 832 (2006).

c. Military Service

Idaho law is silent with respect to retaliation in the context of military service.

d. Political Activities

Idaho law is silent with respect to retaliation in the context of political activities.

e. Medical Leaves

Idaho law is silent with respect to retaliation in the context of medical leave.

f. Maternity/Paternity Leaves

Idaho law is silent with respect to retaliation in the context of maternity or paternity leave.

g. Whistle Blowing

Idaho's Whistleblower Act was enacted in 1994 and "seeks to 'protect the integrity of government by providing a legal cause of action for public employees who experience adverse action from their employer as a result of reporting waste and violations of a law, rule or regulation.'" *See Mallonee v. State*, 139 Idaho 615, 619, 84 P.3d 551, 555 (2004).

An employee's cause of action under the Whistleblower Act is defined in Idaho Code section 6–2105(4):

To prevail in an action brought under the authority of this section, the employee shall establish, by a preponderance of the evidence, that the employee has suffered an adverse action because the employee, or a person acting on his behalf engaged or intended to engage in an activity protected under section 6–2104, Idaho Code.

I.C. § 6–2105(4). Employees who have been retaliated against may sue for lost wages, reinstatement, and other compensatory damages.

h. Safety Complaints

Idaho law is silent with respect to retaliation in the context of safety complaints.

i. Voting

Idaho law is silent with respect to retaliation in the context of voting.

j. Public Conduct Not Associated with Employment

Idaho law is silent with respect to retaliation in the context of public conduct not associated with employment.

k. Private Conduct Not Associated with Employment

Idaho law is silent with respect to retaliation in the context of private conduct not associated with employment.

l. Other

Regarding an employee who asserts a wage claim pursuant to Title 45, Chapter 6 of the Idaho Code, "[n]o employer shall discharge or in any other manner retaliate against any employee because that employee has made a complaint to the employer, or to the department, or filed suit alleging that the employee has not been paid in accordance with the provisions of this chapter, or because the employee has testified or may be about to testify in an investigation or hearing undertaken by the department." I.C. § 45-613.

10. Is the state a deferral state for charges filed with the EEOC?

Yes, the Idaho Human Rights Commission also handles complaints under federal law deferred to it by the EEOC.

11. Are there any state laws related to compensation, including wage and hour, paid time off, mandatory breaks, fringe benefits, allowable deductions, prevailing wage rates for public contracts, etc.?

The two primary considerations in Idaho wage and hour laws are: (1) payment of the minimum wage and (2) payment for overtime hours. Under the minimum wage laws, employers must pay employees an amount that is at least the statutory minimum wage multiplied by the number of hours that the employee worked in any given work week. Under the laws governing overtime, employers must pay most employees additional compensation for overtime hours.

Employers in Idaho must pay the federal minimum wage, which is $7.25 per hour. I.C. § 44-1502(1). There are a couple of exceptions to that wage rate, including "tipped employees" who shall not receive an hourly rate of less than $3.35 per hour, and employees under twenty years of age, who may not receive less than $4.25 per hour. I.C. § 44-1502(2)-(3); *see also* I.C. § 44-1504 (listing other employees excepted from minimum wage laws).

Idaho's Claims for Wages Act (Idaho Code §§ 45-601, et seq.) addresses the ministerial requirements of the payment of wages. If a plaintiff pursues a wage claim under this Act, he or she may be awarded attorney fees and costs, as well as (1) unpaid wages plus the penalties provided for in I.C. § 45-607; or (2) damages in the amount of three times the unpaid wages, whichever is greater. I.C. § 45-615.

Idaho law does not require that employees receive a certain amount of paid time off, whether for vacation, holidays, or sick leave. If benefits are provided, the only requirement is that they are administered in a non-discriminatory manner. Similarly, Idaho law does not require the provision of meal and rest breaks.

For most adult workers, there are no limits on daily work hours as long as minimum wage and overtime laws are complied with. However, Idaho's child labor laws impose limitations on the hours minors can work. *See* I.C. § 44-1301, et seq.

12. Is there a state statute governing paid or unpaid leaves?

i. Medical

Idaho law does not require employers to provide employees with sick leave benefits, either paid or unpaid. An employer in Idaho may be required to provide an employee unpaid sick leave in accordance with the Family and Medical Leave Act or other federal laws.

ii. Maternity / paternity

Idaho law does not require employers to provide employees with maternity or paternity leave, either paid or unpaid. An employer in Idaho may be required to provide an employee unpaid leave in accordance with the Family and Medical Leave Act or other federal laws. The Family and Medical Leave Act (FMLA) is a federal law that entitles eligible employees to unpaid, job-protected leave, under qualifying circumstances, including for the birth or adoption of a child.

iii. Military

Idaho law does not require employers to provide employees with military leave, either paid or unpaid. An employer in Idaho may be required to provide unpaid leave in accordance with the Family and Medical Leave Act or other federal laws. The Family and Medical Leave Act (FMLA) is a federal law which entitles eligible employees to unpaid, job protected leave, under qualifying circumstances, to family members of qualifying military service members.

iv. Voting

Idaho does not have a law that requires an employer to grant its employees leave, either paid or unpaid, to vote.

v. Jury duty

An employer is not required to pay an employee for responding to a jury summons or serving on a jury. However, an employer may not discharge, penalize, threaten, or otherwise coerce an employee who receives and/or responds to a jury summons or who serves on a jury. I.C. § 2-218.

13. Is there a state law governing drug-testing?

The Employer Alcohol and Drug Free Workplace Act (Idaho Code §§ 72-1701, et seq.) provides in part:

(1) The purpose of this act is to promote alcohol and drug-free workplaces and otherwise support employers in their efforts to eliminate substance abuse in the workplace, and thereby enhance workplace safety and increase productivity. This act establishes voluntary drug and alcohol testing guidelines for employers that, when complied with, will find an employee who tests positive for drugs or alcohol at fault, and will constitute misconduct under the employment security law as provided in section 72-1366, Idaho Code, thus resulting in the denial of unemployment benefits.

(2) It is the further purpose of this act to promote alcohol and drug-free workplaces in order that employers in this state be afforded the opportunity to maximize their levels of productivity, enhance their competitive positions in the marketplace and reach their desired levels of success without experiencing the cost delays and tragedies associated with work-related accidents resulting from substance abuse by employees.

14. Is there a medical marijuana statute?

Idaho is one of the few states with no medical marijuana legislation.

15. Is there trade secret / confidential information protection for employers?

Idaho has adopted the Uniform Trade Secrets Act, codified under Idaho Code § 48-801, *et seq*. and referred to as the Idaho Trade Secrets Act (ITSA). The ITSA prohibits the misappropriation of "trade secrets," which are defined as:

> [I]nformation, including a formula, pattern, compilation, program, computer program, device, method, technique, or process, that:
>
> (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
>
> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. . . .

I.C. § 48-801(5). In order to prevail in a misappropriation action under the ITSA, the plaintiff must show that a trade secret actually existed. *Basic Am., Inc. v. Shatila*, 133 Idaho 726, 735, 992 P.2d 175, 184 (1999). In determining whether the plaintiff has made this showing, Idaho courts have looked favorably to six factors from the Restatement of Torts:

> (1) the extent to which the information is known outside [the plaintiff's] business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and his competitors; (5) the amount of effort or money expended by him in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Wesco Autobody Supply, Inc. v. Ernest, 149 Idaho 881, 898, 243 P.3d 1069, 1086 (2010) (quoting Restatement of Torts § 757 cmt. b (1939)).

An action for misappropriation under the ITSA must be brought within three years after the misappropriation is discovered or, by the exercise of reasonable diligence, should have been discovered. I.C. § 48-805. A successful plaintiff may be awarded injunctive relief (*see* I.C. § 48-802), or damages, which could include the actual loss caused by the misappropriation and—if willful and malicious misappropriation exists—exemplary damages not to exceed twice the award of actual loss. I.C. § 48-803.

16. Is there any law related to employee's privacy rights?

Idaho statutory law is silent with respect to employee rights regarding privacy and monitoring of employees in the workplace. However, Idaho courts have recognized the tort of invasion of privacy, which may apply in the workplace context. Idaho law is silent with respect to the protection of social media passwords in the employment context and is also silent on employer monitoring of employees' social media accounts.

17. Is there any law restricting arbitration in the employment context?

Idaho has adopted the Uniform Arbitration Act (Idaho Code §§ 7-901, et seq.). However, the Uniform Arbitration Act does not apply to arbitration agreements between employers and employees (unless otherwise provided in the agreement). That said, mandatory arbitration agreements between an employer and employee are enforceable subject to normal contract rules.

18. Is there any law governing weapons in the employment context?

Under Idaho law, employers are not liable for civil damages resulting from the employer allowing employees from storing firearms in their personal vehicles on the employer's property. I.C. §5-341.

Additionally, Idaho's public colleges and universities are now prohibited from enacting regulations that limit an individual's right to carry a concealed weapon on campuses. I.C. § 18-3309(2). Those with concealed carry permits are allowed to have firearms on

campuses, except in dorms or within a public entertainment facility, provided that proper signage is conspicuously posted at each point of public ingress to the facility notifying attendees of any restriction on the possession of firearms in the facility during the game or event. I.C. § 18-3309(2)(a).

Other than the statutes referenced above, no other state statutes or regulations govern weapons in the employment context.

19. Miscellaneous employment or labor laws not discussed above?

Not applicable.

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1. Is the state generally an employment-at-will state?

Indiana is an employment-at-will state, in which the presumption of at-will employment is strong. *Orr v. Westminster Village North*, 689 N.E.2d 712, 717 (Ind. 1997). In the absence of an employment contract for a definite term, employment is at-will and presumably terminable at any time, with or without cause, by either party. *Id.*

However, there are three exceptions to the employment-at-will doctrine. First, if an employee establishes that "adequate independent consideration" supports the employment contract, courts generally will conclude that the parties intended to establish a relationship in which the employer may terminate the employee only for good cause. Such consideration is provided when, for example, the employer is aware that the employee had a former job with assured permanency and is only accepting the new job upon receiving assurances the new employer could guarantee similar permanency. *Id.* at 718.

Second, courts have a recognized a public policy exception where clear statutory expression of a right or duty is contravened. (See Question 3.) Third, a terminated employee may invoke the doctrine of promissory estoppel, asserting and demonstrating that the employer made a promise to the employee which the employee relied on to his or her detriment. *Orr v. Westminster Village North*, 689 N.E.2d 712, 718 (Ind. 1997).

2. Are there any statutory exceptions to the employment-at-will doctrine?

As noted below, public policy exceptions to the employment-at-will doctrine exist where there is a statute defining the public policy. *Hamblen v. Danners*, 478 N.E.2d 926, 929 (Ind. Ct. App. 1985). Therefore, the existence of statutes such as the Worker's Compensation Act, Ind. Code § 22-3-2-2- et seq., and the Occupational Diseases Act, Ind. Code § 22-3-7-2 et seq., along with the public policy exception, create something like statutory exceptions.

In addition, there are specific statutory exceptions that do not depend on the application of the public policy exception. Laws related to retaliation, employee gun ownership, employee absences and leave, and the like act to limit the employment-at-will doctrine. (See Questions 9, 11, 12, and 18). For example, no person may discharge or discriminate in any way against an employee because the employee has (1) filed a complaint and instituted any proceeding under the Indiana Occupational Safety and Health Act (IOSHA), (2) testified or planned to testify in any such proceeding, or (3) exercised any right afforded by IOSHA. Ind. Code § 22-8-1.1-38.1(a). An employee who believes that he or she has been discharged or discriminated against for the above reasons may file a complaint with the Commissioner of Labor. Ind. Code § 22-8-1.1-381.1(b).

It is worth noting, first, that Indiana does not have a "mini-WARN" statute to complement the federal Worker Adjustment and Retraining Notification (WARN) Act requiring advance notice to employees of a plant closing or mass layoff. See 29 U.S.C. § 2101(1)-(3). Also, Indiana does not require that an employer notify the state unemployment insurance department in the event of a mass layoff. Finally, the Indiana Civil Rights Law provides that the prohibition against discrimination in employment because of disability does not apply to failure of an employer to employ or to retain as an employee any person who because of a disability is physically or otherwise unable to efficiently and safely perform, at the standards set by the employer, the duties required in that job. Ind. Code § 22-9-1-13(a). After a person with a disability is employed, the employer is not required under the Indiana Civil Rights Law to promote or transfer such disabled person to another job or occupation unless, prior to such transfer, such person by training or experience is qualified for such job or occupation. Ind. Code. § 22-91-1-13(b).

3. Are there any public policy exceptions to the employment-at-will doctrine?

Yes, but the public policy exception is limited and strictly construed, as it is in derogation of the common law. A discharge

which is contrary to general public policy, as opposed to public policy as stated in a statute, is not unlawful.

Campbell v. Eli Lilly and Co., 413 N.E.2d 1054, 1061 (Ind. Ct. App. 1980). Even general expressions of public policy in statutes will not support new exceptions to the employment-at-will doctrine. *Montgomery v. Board of Trustees of Purdue University,* 849 N.E.2d 1120, 1128 (Ind. 2006).

Courts have a recognized a public policy exception only where clear statutory expression of a right or duty is contravened. *Wior v. Anchor Industries Inc.*, 669 N.E.2d 172, 175 (Ind. 1996). The exception protects employees from retaliatory discharge for filing a worker's compensation claim, refusing to commit an illegal act, or appearing for jury duty. See *Frampton v. Central Indiana Gas Co.*, 297 N.E.2d 425 (Ind. 1973); *McClanahan v. Remington Freight Lines Inc.*, 517 N.E.2d 390 (Ind. 1988); *Call v. Scott Brass, Inc.*, 553 N.E.2d 1225 (Ind. Ct. App. 1990). (See Question 9.)

When an employee is discharged, whether expressly or constructively, solely for exercising a statutorily conferred right, an exception to the general rule of at-will employment is recognized and a cause of action exists in the employee. *Tony v. Elkhart County*, 851 N.E.2d 1032, 1039 (Ind. Ct. App. 2006). In such a situation, the claim will be for wrongful discharge. See *Montgomery*, 849 N.E.2d 1120; *Uylaki v. Town v. Griffith*, 878 N.E.2d 412 (Ind. Ct. App. 2007).

A wrongful discharge action, brought by an employee working under a contract which does not permit discharge at will, sounds in breach of contract. *Remington Freight Lines, Inc. v. Larkey,* 644 N.E.2d 931, 940 (Ind. Ct. App. 1994). The wrongful discharge of an employee at will gives rise to a tort action. *McGarrity v. Berlin Metals, Inc.*, 774 N.E.2d 71, 77 (Ind. Ct. App. 2002). Indiana does not recognize a cause of action for breach of an implied covenant of good faith and fair dealing or negligent performance of an employment contract in the at-will employment context. *Northern Indiana Public Service Co. v. Dabagia*, 721 N.E.2d 294, 300 (Ind. Ct. App. 1999).

Compensatory damages may include pecuniary losses and future losses which are directly attributable to the wrong. Although damages must be ascertainable with reasonable certainty, it is not necessary that they be determined with mathematical accuracy. *Stivers v. Stevens*, 581 N.E.2d 1253, 1255 (Ind. Ct. App. 1991). Once an employee proves the discharge was retaliatory, damages must be based on a presumption of prospective employment for a reasonable length of time, as determined by the fact-finder. *Haas Carriage, Inc. v. Berna*, 651 N.E.2d 284, 290 (Ind. Ct. App. 1995).

The wrongfully discharged employee must seek to mitigate his or her damages by seeking comparable employment after discharge. *Remington Freight Lines, Inc. v. Larkey*, 644 N.E.2d at 931, 942 (Ind. Ct. App. 1994). If the employee is unable to obtain comparable employment, however, the fact-finder should consider evidence as to the difference between what the employee would have earned and what the employee actually earned following termination. *Haas Carriage, Inc. v. Berna*, 651 N.E.2d 284, 290 (Ind. Ct. App. 1995). A jury trial is available in such tort actions.

4. Is there any law related to the hiring process?

Indiana does not have a generally applicable employment eligibility or verification statute. Therefore, private-sector employers in Indiana should follow federal law requirements regarding employment eligibility and verification.

Employers are prohibited from assisting or encouraging the migration of an alien to perform labor or services in the state under a contract made before the migration. Any such contract is void. Ind. Code §§ 22-5-1-1 and 22-5-1-2. Employers that are state or local government contractors or subcontractors cannot knowingly hire, retain, or contract with unauthorized aliens. Ind. Code § 22-5-1.7-12(a).

Violations of the provisions regarding contracts for alien labor constitute a Class A misdemeanor punishable by imprisonment and fines. Ind. Code §§ 22-5-1-1 and 35-50-5-2. If a contractor violates the verification provisions, the public agency must terminate the contract if the contractor does not cure the violation within 30 days. The contractor is entitled to a rebuttable presumption that it did not knowingly employ an unauthorized alien. Ind. Code §§ 22-5-1.7-12(b)-(c) and 22-5-1.7-13.

Indiana places no statutory restrictions on a private employer's use of arrest or conviction records. Indiana has not implemented a state "ban-the-box" law covering private employers. Employers may inquire about and use arrest and conviction records, but they may not ask an applicant or employee about, use, or discriminate against any applicant on the basis of any record that has been sealed or expunged. A person whose record is expunged must be treated as if the person had never been convicted of a crime. Ind. Code §§ 35-38-9-10. Employers that discriminate against individuals based on expunged or sealed conviction arrest records are guilty of a Class C infraction; injunctive relief may be ordered. Ind. Code § 35-38-10(f).

5. Does the state recognize implied employment contracts under employment handbooks, policies, or practices?

The Indiana Supreme Court, while not entirely foreclosing the issue, has declined to adopt an exception to the

employment-at-will doctrine to allow an employee handbook, in the absence of independent consideration, to constitute a unilateral employment contract. *Orr v. Westminster Village North, Inc.*, 689 N.E.2d 712, 719-20 (Ind. 1997).

Even assuming that an employee handbook could, under some circumstances, constitute a unilateral contract, a handbook that contains explicit language that it does not create a contract of employment, and that either the employer or employee can terminate employment at any time, for any reason, with or without cause or notice, does not create such a contract. See *McCalment v. Eli Lilly & Co.*, 860 N.E.2d 884 (Ind. Ct. App. 2007).

Likewise, it does not constitute a unilateral contract where it contains no statement that an employee may be discharged only for good cause and no promise to follow a progressive disciplinary approach rather than simply discharging the employee. *Orr v. Westminster Village North, Inc.*, 689 N.E.2d 712, 721 (Ind. 1997). See also *Harris v. Brewer*, 49 N.E.3d 632 (Ind. Ct. App. 2015); *Duty v. Boys and Girls Club of Porter County*, 23 N.E.3d 768 (Ind. Ct. App. 2014).

6. Does the state have a right to work law or other labor / management laws?

Indiana is a right to work state. A person may not require an individual to be a member of or pay charges to a labor organization as a condition of employment. Ind. Code § 22-6-6-1 et seq. Excluded are employees of the United States, employees of Indiana and its political subdivisions, and employees subject to the federal Railway Labor Act. Ind. Code § 22-6-6-1. A contract or agreement, written or oral, between a labor organization and an employee which violates Indiana's right to work law is void. Ind. Code § 22-6-6-9.

A person who knowingly or intentionally, directly or indirection, violates this law commits a Class A misdemeanor. Ind. Code § 22-6-6-10. An individual who is employed by an employer may file a complaint that alleges a violation or threatened violation of this law with the Indiana Attorney General, Department of Labor, or county prosecuting attorney, any of which may investigate and enforce compliance. Ind. Code § 22-6-6-11. If an individual suffers an injury from a violation or threatened violation of the law, the individual may also bring a civil action, in which case a court may award the greater of actual and consequential damages or liquidated damages, plus attorney's fees, and declaratory or equitable relief. Ind. Code § 22-6-6-12.

7. What tort claims are recognized in the employment context?

With the exceptions and caveats mentioned below, Indiana law recognizes IIED, NIED, harassment, assault, battery, invasion of privacy, and fraud claims, and makes little distinction between such claims made inside and outside of the employment context. Also, the wrongful discharge of an employee at will gives rise to a tort action. *McGarrity v. Berlin Metals, Inc.*, 774 N.E.2d 71, 77 (Ind. Ct. App. 2002). (See Questions 3 and 9.)

Note on intentional torts and the Worker's Compensation Act: The Worker's Compensation Act's exclusivity provision is expressly limited to personal injury or death which occurs "by accident." (See Question 19.) An injury occurs by accident only when it is intended by neither the employee nor the employer. *Baker v. Westinghouse Elec. Corp.*, 637 N.E.2d 1271, 1273 (Ind. 1994). Therefore, the Worker's Compensation Act does not preclude recovery in tort for an employer's intentional torts. *Lawson v. Raney Mfg., Inc.*, 678 N.E.2d 122, 125 (Ind. Ct. App. 1997). Further, the Worker's Compensation Act addresses only death and personal injury; it does not preempt actions in tort to recover damages for emotional or reputational injuries. *Perry v. Stitzer Buick GMC*, 637 N.E.2d 1282, 1288 (Ind. 1994). Where the heart of the employee's injury is not physical, but emotional, and the employee alleges that the defendants' actions caused him or her emotional distress, the Workers' Compensation Act does not apply to the claim. *Branham v. Celadon Trucking Services, Inc.*, 744 N.E.2d 514, 520 (Ind. Ct. App. 2001).

Note on IIED claims: In Indiana, the requirements to prove the tort of intentional infliction of emotional distress are rigorous. *Haegert v. McMullan,* 953 N.E.2d 1223, 1235 (Ind. Ct. App. 2011). The plaintiff must prove the defendant engaged in extreme and outrageous conduct which intentionally or recklessly caused severe emotional distress to another. See *J.H. v. St. Vincent Hosp. and Health Care Center, Inc.*, 19 N.E.3d 811 (Ind. Ct. App. 2014). Typically, intentional infliction of emotional distress is found where conduct exceeds all bounds usually tolerated by a decent society and causes mental distress of a very serious kind. *Johnson ex rel. Indiana Dept. of Child Services v. Marion County Coroner's Office*, 971 N.E.2d 151, 162 (Ind. Ct. App. 2012). However, emotional distress is not a recoverable damage under a pure breach of contract theory. *Tucker v. Roman Catholic Diocese of Lafayette-In-Indiana*, 837 N.E.2d 596, 601 (Ind. Ct. App. 2005). No cause of action exists for intentional infliction of emotional distress involving the breach of at-will employment contracts. *Mehling v. Dubois Cnty. Farm Bureau Co-op. Ass'n, Inc.,* 601 N.E.2d 5 (Ind. Ct. App. 1992).

Note on NIED claims: In Indiana, actions seeking damages for emotional distress resulting from the negligence of another are now permitted in two situations: where the plaintiff has (1) witnessed the death or sever injury of certain classes of relatives (i.e., the bystander rule) or come to the scene soon thereafter; or (2) suffered a direct impact (i.e., the modified impact rule). *Spangler v. Bechtel*, 958 N.E.2d 458 (Ind. 2011).

Note on invasion of privacy: In Indiana, the general tort known as invasion of privacy has four strands: (1) unreasonable

Hambright, 776 N.E.2d, 1272, 1282 (Ind. Ct. App. 2002). The tort of invasion of privacy is similar to defamation but involves injuries to emotions and mental suffering rather than injury to reputation. The extent to which the tort of invasion of privacy is recognized in Indiana is not yet settled. See *Allstate Ins. Co. v. Dana Corp.*, 759 N.E.2d 1049 (Ind. 2001). In fact, the Indiana Supreme Court has ruled, in a plurality opinion, that a tort claim for invasion of privacy based on public disclosure of private facts, the third category above, is not recognized in Indiana. See *Doe v. Methodist Hosp.*, 690 N.E.2d 681 (Ind. 1997).

Invasion of privacy claims that arise in the employment context are most often of the second type mentioned above – so-called "false-light" invasions of privacy. One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his or her privacy, if (1) the false light in which the other was placed would be highly offensive to a reasonable person, and (2) the actor had knowledge or acted in reckless disregard as to the falsity of the publicized matter. *Lovings v. Thomas,* 805 N.E.2d 442 (Ind. Ct. App. 2004). See *Branham v. Celadon Trucking Services, Inc.,* 744 N.E.2d 514 (Ind. Ct. App. 2001) (employee did not suffer false-light privacy invasion from a supervisor circulating a sexually suggestive but accurate photo of him in the break room at work); *Lovings v. Thomas,* 805 N.E.2d 442 (Ind. Ct. App. 2004) (union employee did not place business owners before the public in a false light by informing convention management that the owner was "causing a problem up by our booth").

8. Is there a common law or statutory prohibition against discrimination / hostile work environment?

The Indiana Civil Rights Law (ICRL) provides protection from most of the same types of discrimination addressed by federal civil rights law: race, religion, color, sex, disability, national origin, and ancestry. Ind. Code § 22-9-1-2(a). The Indiana Civil Rights Commission (ICRC) and Indiana courts regularly look to Title VII precedent as guidance when deciding cases arising under the ICRL. See *Indiana Civil Rights Comm'n v. Alder*, 714 N.E.2d 632, 636 (Ind. 1999); *Indiana Dep't of Nat. Res. V. Cobb*, 832 N.E.2d 585, 591 (Ind. Ct. App. 2005).

The ICRL covers employers with six or more employees, excluding nonprofit corporations, fraternal and religious associations, and social clubs. Ind. Code § 22-9-1-3(h). It does not create an independent private right of action that allows an employee or applicant to sue directly in state court. *Ellis v. CCA of Tenn., L.L.C.*, 2010 U.S. Dist. LEXIS 61837, at 27-28 (S.D. Ind. 2010); *M.C. Welding & Machining Co. v. Kotwa*, 845 N.E.2d 188, 192 (Ind. Ct. App. 2006). The employee or unsuccessful applicant must first seek relief through the ICRC. If the ICRC enters a probable cause finding, the parties may proceed to a hearing before an ALJ or, upon agreement, move into the state court system. No jury trial is available. Ind. Code § 22-9-1-17.

Additionally, the Indiana Age Discrimination Act (IADA) prohibits an employer from refusing to hire, firing, or refusing to rehire any person who is at least 40 and not yet 75 years of age, because of his or her age. Ind. Code §§ 22-9-2-1 and 22-9-2-2. This protection does not apply to private domestic servants, farm laborers, or persons who are already eligible to receive benefits under an employer's pension plan or system. Ind. Code §§ 22-9-2-10. The IADA covers all employers with one or more employees, excluding religious, charitable, fraternal, social, educational, or sectarian corporations or associations not organized for private profit, other than labor organizations, as well as any or entity subject to the federal Age Discrimination in Employment Act. Ind. Code § 22-9-2-1.

The only notable protection against off-duty conduct discrimination concerns the use of tobacco products. Indiana employers, not including churches, religious organizations, and their affiliated schools and businesses, are prohibited from discriminating against any employee or applicant who uses tobacco products. Ind. Code §§ 22-5-4-1 and 22-5-4-4.

There are no antiharassment training and education requirements mandated for private employers in Indiana, although training is recommended to minimize liability.

9. Is there a common law or statutory prohibition of retaliation?

As discussed above in response to Question 3, the public policy exception to the employment-at-will doctrine protects employees from retaliation by an employer. The exception protects employees from retaliatory discharge for filing or stating an intention to file a claim under the Worker's Compensation Act. See *Caskey v. Colgate Palmolive Co.,* 438 F. Supp. 2d (S.D. Ind. 2006); *Purdy v. Wright Tree Service, Inc.*, 835 N.E.2d 209 (Ind. Ct. App. 2005); *Hudson v. Wal-Mart Stores, Inc.*, 412 F.3d 781 (7th Cir. 2005); *Stivers v. Stevens*, 581 N.E.2d 1253 (Ind. Ct. App. 1991). Retaliatory discharge for filing a worker's compensation claim is considered a wrongful, unconscionable act and is actionable in a court of law. *Baker v. Tremco Inc.,* 890 N.E.2d 73 (Ind. Ct. App. 2008).

The public policy exception also protects employees from discharge in retaliation for their refusing to violate Indiana law, federal law, or the law of another state. See *Walt's Drive-A-Way Service, Inc. v. Powell,* 638 N.E.2d 857 (Ind. Ct. App. 1994); *McClanahan v. Remington Freight Lines, Inc.,* 517 N.E.2d 390 (Ind. 1988). The employer need not specifically require the employee to commit an unlawful act, so long as the employer knew or should have known that an act it was requiring was illegal. *Haas Carriage, Inc. v. Berna*, 651 N.E.2d 284, 288 (Ind. Ct. App. 1995).

Indiana's False Claims and Whistleblower Act (IFCWA) mirrors the federal False Claims Act and provides that an employee is entitled to relief if he or she is discharged, demoted, suspended, harassed, or otherwise discriminated against for (1) objecting to a violation of the IFCWA, or (2) initiating, testifying, or participating in an investigation, action, or hearing. Ind. Code § 5-11-5.5-8(a). To establish a retaliatory discharge claim under the IFCWA, an employee must prove: (1) he or she acted in furtherance of an FCA enforcement action; (2) the employer knew the employee was engaged in this protected conduct; and (3) the employer was motived, at least in part, to terminate his or her employment because of the protected conduct. See *United States v. Indianapolis Neurosurgical Grp. Inc.*, 2013 U.S. Dist. LEXIS 23610, at 23-24 (S.D. Ind. 2013).

The trial court, rather than the Indiana Civil Rights Commission, has jurisdiction over an employee's retaliatory discharge claim where it is alleged that the employer terminated his or her employment because he or she applied for unemployment benefits. See *M.C. Welding and Machining Co., Inc. v. Kotwa*, 845 N.E.2d 188 (Ind. Ct. App. 2006). An employer does not show that it is entitled to summary judgment on the issue of retaliatory discharge merely by alleging an independent reason for discharging the employee, if the evidence permits an inference that the employer's stated reason is pretextual. *Markley Enterprises, Inc. v. Grover*, 716 N.E.2d 559 (Ind. Ct. App. 1999). Generally, the question of retaliatory motive for a discharge is a question for the trier of fact. *Tony v. Elkhart County*, 918 N.E.2d 363, 370 (Ind. Ct. App. 2009).

Indiana law does not address family or medical leave, paid sick leave, pregnancy leave, adoptive parents leave, school activities leave, voting leave, or political participation leave. Because courts have recognized a public policy exception only where clear statutory expression of a right or duty is contravened, there presumably is no legal protection against retaliation for the taking of such leaves of absence.

If an employee receives a jury summons and notifies his or her employer or supervisor within a reasonable period after receiving the summons, the employer or supervisor may not subject the employee to any adverse employment action or require the employee to use annual, vacation, or sick leave. Ind. Code § 33-28-5-3. To do so would be "interference with jury service," a Class B misdemeanor. Ind. Code § 35-44.1-2-11. An employee whose employer knowingly or intentionally dismissed him or her for jury-related service may sue the employer within 90 days of discharge for reinstatement, lost wages, and reasonable attorneys' fees. Ind. Code § 34-28-4-1.

Additionally, a person who knowingly dismisses an employee, deprives an employee of employment benefits, or threatens such action because the employee has received or responded to a subpoena in a criminal proceeding commits "interference with witness service," a Class B misdemeanor. Employers must allow unpaid leaves for employees to comply with subpoenas in criminal matters. Ind. Code § 35-44.1-2-12. No statute requires witness duty leave for civil proceedings.

Private employers must grant members of the National Guard, members of military reserve components, and retired personnel of U.S. naval, air, or ground forces a leave of absence, separate from the employee's vacation period, for the total number of days that the member is called by Indiana's governor to serve on state active duty. State active duty leave may be paid or unpaid at the employer's discretion. Ind. Code §§ 10-16-7-6 and 10-16-7-7. Indiana government and public school employers must grant such persons 15 days of paid leave per calendar year to participate in training or to serve as a member of any reserve component by order. This leave must be offered in addition to any vacation entitlement. Ind. Code §§ 10-16-7-2 and 10-16-7-5. An employer who knowingly or intentionally refuses to allow a member of the Indiana National Guard to attend any assembly at which the member has a duty to perform statutorily defined services commits a Class B misdemeanor. Ind. Code § 10-16-7-4.

Further, Indiana employers with 50 or more employees must provide an eligible employee who is the spouse, parent, grandparent, child, or sibling of an individual ordered to active duty in the U.S. armed forces or Indiana National Guard up to ten working days of unpaid, job-protected leave in a single calendar year because of the deployment. Ind. Code §§ 22-2-13-1 et seq.

An employee may enforce leave rights with a civil action in an Indiana circuit court, which may enjoin any act or practice that violates the leave law and order any necessary and proper equitable relief. See, e.g., Ind. Code § 22-2-13-16.

10. Is the state a deferral state for charges filed with the EEOC?

Indiana is a deferral state for charges filed with the EEOC. An individual has 300 days from the date of alleged harm to file a charge against an employer with 15 or more employees for discrimination based on race, color, national origin, sex, religion, and/or disability in Indiana. An individual has 180 days from the date of alleged harm to file a charge against an employer with 20 or more employees for discrimination based on age in Indiana. Charges against employers of less than 15 employees (for race, color, national origin, sex, religion, and/or disability) or less than 20 employees (for age) must be filed with the appropriate state or local agency within 90 days in the cities of East Chicago, Fort Wayne, Gary, and South Bend, and 180 days outside of those cities.

11. Are there any state laws related to compensation, including wage and hour, paid time off, mandatory breaks, fringe benefits, allowable deductions, prevailing wage rates for public contracts, etc.?

The Indiana Minimum Wage Law of 1965 applies only to Indiana employees that have at least two employees and are not subject to the minimum wage requirements of the Federal Labor Standards Act (FLSA). Ind. Code § 22-2-2-3. In those rare cases, the law requires the employer to pay each employee at least the federally-mandated minimum wage for each hour worked up to 40 hours in a workweek, tipped employees excepted. Ind. Code §§ 22-2-2-3, 22-2-2-4. The Minimum Wage Law excludes a variety of people from the definition of employee, including people under the age of 16, independent contractors, employees paid on a commission basis, and people employed by their own parent, spouse, or child. *Id.*

The Minimum Wage Law mandates that covered employers pay at least one and one-half times the employee's regular hourly rate of pay for each hour worked over 40 hours in a workweek. Employers subject to the FLSA are covered by its provisions instead. The following are exempt: executive, administrative, and professional employees who have the authority to employ or discharge others and who earn at least $150 per week; employees who regularly earn 1.5 times the state minimum wage, if half their compensation comes from commission; and outside salesmen. *Id.*

The Minimum Wage Law gives employees the right to sue for unpaid wages and an equal additional amount of liquidated damages, but actions must be brought within three years after the cause of action arises. A prevailing plaintiff may recover attorneys' fees and costs. Ind. Code § 22-2-2-9. There exist criminal penalties for knowing, intentional, or repeated violations. Ind. Code § 22-2-2-11.

Indiana state law does not generally require employers to provide rest breaks, meal breaks, or breaks for other purposes to adult employees. Indiana Dep't of Labor, *Wage & Hours FAQs*, Question 2.D (Breaks/Lunches). However, minor employees must be provided one or two rest periods totaling at least 30 minutes if scheduled to work at least six consecutive hours. Ind. Code § 20-33-3-30(b). An initial violation will result in a warning from the Indiana Department of Labor; a second violation results in a $100 civil penalty, which increases $100 with each subsequent violation, until reaching a maximum of $400. Ind. Code § 20-33-3-40. Indiana law does not contain any provisions addressing what constitutes compensable work time.

Wages may be paid by cash, check, draft, money order, or electronic transfer. Ind. Code §§ 22-2-4-1 and 22-2-5-1. An employer must pay its employees their wages no later than 10 business days after the end of each pay period. An employer must pay non-salaried employees eligible for overtime compensation under the FLSA at least semi-monthly or biweekly, if requested to do so. *Id.* Special rules apply for certain industries. Ind. Code § 22-2-5-1.1.

Indiana law very narrowly circumscribes the deductions that an employer may make from an employee's paycheck. Nonmandatory deductions are called wage assignments. Ind. Code § 22-2-6-1. To be valid, a wage assignment must (1) be in writing, (2) be signed by the employee and employer, (3) state on its face that the employee may revoke the assignment at any time by written notice to the employer, and (4) be returned to the employer within 10 days after the employer signs it. Ind. Code § 22-2-6-2(a). Wage assignments are valid only in 14 different circumstances set forth by law. See Ind. Code § 22-2-6-2(a).

Wage claim filing procedures differ based on the employee's status. Claims by current employees or employees who voluntarily separated from the employer are covered by the Wage Payment Statute; such employees may proceed directly to court. Ind. Code § 22-2-5-2. Employees who have been involuntarily terminated may pursue claims under the Wage Claims Statute; they must file a claim with the Indiana Department of Labor. Ind. Code § 22-2-9-4; *Haugle v. Beech Grove City Schs.*, 864 N.E.2d 1058, 1061 n. 1 (Ind. 2007). However, the penalty is the same: an employer who violates either statute will be liable not only for the wages due, but also for liquidated damages at a rate of 10% per day for each day wages remain unpaid, until liquidated damages are double the amount of wages originally due. The employer will also be required to pay any attorneys' fees. Ind. Code § 22-2-5-2. A two-year statute of limitations applies. Ind. Code § 34-11-2-1.

12. Is there a state statute governing paid or unpaid leaves?

Indiana does not have a statute that explicitly addresses either vacation pay or holiday pay. Holiday pay is generally considered a gratuity provided at an employer's discretion, not "wages." However, vacation pay, some sick pay, and many bonuses are considered wages. *Die & Mold, Inc. v Western*, 448 N.E.2d 44, 48 (Ind. Ct. App. 1983); *Schwartz v. Gary Cmty. Sch. Corp.*, 762 N.E.2d 192, 197-99 (Ind. Ct. App. 2002); *Gurnik v. Lee*, 587 N.E.2d 706, 709 (Ind. Ct. App. 1992).

These types of deferred compensation will accrue over time and be payable at some later date unless there is an agreement or published policy to the contrary. Employers thus have wide latitude to place conditions on such deferred compensation; they may implement a paid time off policy with a use-it-or-lose-it provision or require forfeiture of accrued paid time off upon termination of employment. See *Commissioner of Labor ex rel. Shofstall v. Int'l Union of Painters & Allied Trades AFL-CIO, CLC Dist. Council 91*, 991 N.E.2d 100 (Ind. 2013); *Williams v. Riverside Cmty. Corr. Corp.*, 846 N.E.2d 738

Indiana does not require employers to provide employees with a day of rest each week or compensate employees at a premium rate for work performed on the seventh consecutive day of work or on holidays. Indiana does not address family leave, medical leave, paid sick leave, pregnancy leave, adoptive parents leave, school activities leave, or voting leave for private-sector employees. (Ind. Ct. App. 2006)

13. Is there state law governing drug-testing?

Indiana law contains no general provisions mandating preemployment drug or alcohol screening by private employers. For voluntary screening by employers, Indiana has no specific procedural requirements for administering controlled substance testing, but particular statutes, both federal and state, explain the scope and extent of permissible testing. For instance, because a controlled substance test is not an "independent medical examination," the employer does not have the right to order a substance test under the Indiana Worker's Compensation Act.

Indiana employers may make employment decisions based on applicant and employee drug test results. Ind. Code § 22-9-5-24. With respect to employees who have completed a drug rehabilitation program, employers may adopt reasonable policies and procedures, including drug testing, to ensure illegal drug use has ceased. Ind. Code § 22-9-5-6(b)(1)-(2).

14. Is there a medical marijuana statute?

Cannabidiol, or CBD oil lacking THC, may be used to treat severe epilepsy. A doctor may prescribe CPD oil after diagnosing a patient with treatment-resistant epilepsy. The Indiana Department of Health maintains a mandatory registry of such patients. Ind. Code § 16-42-28.6. Otherwise, the use, distribution, or sale of marijuana for medical or recreational purposes is illegal.

15. Is there trade secret / confidential information protection for employers?

In the absence of contractual restriction to the contrary, employees in Indiana are not precluded from competing with a former employer. Indiana law recognizes an employee may generally plan, form, and outfit a competing business without breaching his or her duty of loyalty to an employer. *Potts v. Review Bd. of Ind. Emp't Sec. Div.*, 475 N.E.2d 708 (Ind. Ct. App. 1985). Indiana courts recognize the fine line between innocent preparations for competing against a current employer and active competition with that employer by an employee, which may be either a breach of fiduciary duty or a breach of the duty of loyalty. See *Economation, Inc. v. Automated Conveyor Sys., Inc.*, 694 F. Supp 553 (S.D. Ind. 1988); *Davis v. Eagle Prods. Inc.*, 501 N.E.2d 1099 (Ind. Ct. App. 1986).

There is no statute in Indiana that governs the enforceability of noncompetition covenants. Indiana courts generally view covenants not to compete as restraints on trade that are disfavored. See *MacGill v. Reid*, 850 N.E.2d 926 (Ind. Ct. App. 2006). However, Indiana courts enforce covenants not to compete that, under the circumstances, are necessary to protect a legitimate interest of the employer, are reasonable and not unduly restrictive of the employee, and are not contrary to the public interest. *Sharvelle v. Magnante,* 836 N.E.2d 432, 437 (Ind. Ct. App. 2005).

Indiana has adopted, with some alterations, the Uniform Trade Secrets Act (UTSA), which displaces all conflicting Indiana state law. As adopted in Indiana, the UTSA defines a "trade secret" expansively, as information that derives independent economic value, actual or potential, from not being generally known or readily ascertainable, and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. Ind. Code § 24-2-3-2.

Misappropriate of a trade secret can occur through acquisition by a person who knows or has reason to know that the trade secret was acquired by improper means, or through unauthorized use or disclosure of the trade secret. *Id.* A court may enjoin actual or threatened misappropriation of a trade secret. Ind. Code § 24-2-3-3. In addition to or in lieu of injunctive relief, the complainant may recover damages for the actual loss caused by misappropriation. Ind. Code § 24-2-3-4(a). In cases of willful and malicious misappropriation, a court may award punitive damages up to twice the amount awarded for actual loss and unjust enrichment. Ind. Code § 24-2-3-4(c).

16. Is there any law related to employee's privacy rights?

Indiana does not have a state equivalent of the Fair Credit Reporting Act (FCRA); there are no additional state provisions specifically restricting a private employer's use of credit information and history. Indiana law contains no express provisions regulating employer access to applicants' or employees' social media accounts. Indiana law contains no express provisions regulating polygraph examinations for applicants or employees.

Under the Indiana Disclosure of Firearm and Ammunition Information as a Condition of Employment law, a private employer may not require an applicant or employee to disclose information about whether he or she owns, possesses, uses, or transports a firearm or ammunition. An employer may not condition employment on an agreement to forego the right to lawfully possess, own, store, use, or transport a firearm or ammunition. Ind. Code § 34-28-8-6. An individual aggrieved by an

employer's violation of this law may bring a civil action. Ind. Code § 34-28-8-7.

Under Indiana's data security statute, when a covered entity discovers or is notified of a breach of its security system involving the unauthorized acquisition of personal information, the entity must notify all affected parties. Ind. Code § 24-4.9-1-1 et seq. Disclosure is required if the covered entity knows, or should know, that the breach has resulted in or could result in identity theft or fraud. Ind. Code § 24-4.9-3-1(a). "Personal information" is defined as a Social Security number, or an individual's first name or first initial and last name, in combination with a driver's license number, state identification card number, credit card number, or financial account number or debit card number. Ind. Code § 24-4.9-2-10.

17. Is there any law restricting arbitration in the employment context?

A written agreement between employers and employees to submit to arbitration is valid except upon such grounds as exist at law or in equity for the revocation of any contract. Ind. Code § 34-57-2-1. The fact that the relief granted by the arbitrator was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award. Ind. Code § 34-57-2-13.

While there is no Indiana law restricting arbitration in the employment context in particular, courts in Indiana will consider whether the presence of a form arbitration clause makes a contract an unconscionable "adhesion contract," so as to preclude an order to compel arbitration. An "adhesion contract" is a standardized contract which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it. Such contracts are not per se unconscionable, but they may be deemed so if a great disparity in bargaining power exists between the parties, such that the weaker party is made to sign a contract unwillingly or without being aware of its terms. *Sanford v. Castleton Health Care Center, LLC,* 813 N.E.2d 411, 417 (Ind. Ct. App. 2004).

18. Is there any law governing weapons in the employment context?

Yes. Indiana's handgun regulation statute specifically does not prevent a person who owns, leases, or rents private property from regulating or prohibiting the possession of firearms on the private property. Ind. Code § 35-47-2-1(d). Further, an employer is not prohibited from regulating or prohibiting the possession or carrying of a firearm by an employee in the course of his or her duties. At the same time, an employer may not adopt or enforce an ordinance, resolution, policy, or rule that prohibits an employee from possessing a firearm or ammunition that is locked in the trunk of the employee's vehicle, kept in the glove compartment of the employee's locked vehicle, or stored out of plain sight in the employee's locked vehicle. However, employers may prohibit employees from possessing a gun in violation of federal law or on certain kinds of property, such as child care centers, domestic violence shelters, the employer's residence or personal vehicle, or public utility property. Ind. Code § 34-28-7-2.

19. Miscellaneous employment or labor laws not discussed above?

Worker classification: In Indiana, as elsewhere, an individual who provides services to another for payment generally is considered either an independent contractor or an employee. For the most part, the distinction between an independent contractor and an employee is dependent on the applicable state law, which in turn is dependent upon the purpose of determining the classification. For income tax, wage and hour laws, and worker's compensation purposes, the Indiana Department of Revenue, Indiana Department of Labor, and Worker's Compensation Board of Indiana, respectively, will use the IRS twenty-factor test to classify workers. Ind. Code §§ 6-3-1-5 and 6-3-1-6, 22-2-15-3, and 22-3-6-1(b)(7).

For unemployment insurance purposes, the Indiana Department of Workforce Development will apply a statutory, modified "ABC test." Ind. Code § 22-4-8-1(b). (Under a typical formulation of the ABC test, a worker is an independent contractor if: (A) there is an "Absence" of control; (B) the "Business" is performed outside the usual course of business or performed away from the place of business; and (C) the work is "Customarily" performed by independent contractors.)

Workplace safety: Indiana, under agreement with federal Occupational Safety and Health Administration (Fed-OSHA), operates its own state occupational safety and health program in accordance with section 18 of the Fed-OSH Act. Thus, Indiana is a "state plan" jurisdiction, with its own detailed rules for occupational safety and health that parallel, but are not separate from, Fed-OSHA standards. Pursuant to Indiana's Occupational Safety and Health Act, an occupational safety standards commission has been created to promulgate, modify, or revoke safety and health standards in Indiana and to hear and determine applications for temporary and permanent variances from those standards. Ind. Code § 22-8-1.1-7.

Under the Indiana law, every Indiana employer must establish and maintain conditions of work that are reasonably safe and healthy for employees. Such conditions include a working environment that is free from recognized hazards that are likely to cause death or serious physical harm to employees. Ind. Code § 22-8-1.1-2. The OSS Commission has the authority to inspect an employer's place of business to ensure its compliance with the law. Ind. Code § 22-8-1.1-23.1(a)(1). If, after the inspection, it

is determined that an employer is not in compliance, the OSS may issue a "safety order," which describes the nature of the violation and provides a deadline for correcting the harm. Ind. Code § 22-8-1.1-25.1(a). In Indiana, employers are prohibited from discharging or retaliating in any way against an employee who has filed a complaint or is otherwise participating in a proceeding that relates to a violation of state workplace health and safety standards. Ind. Code. § 22-8-1.1-38.1.

The Indiana Worker's Compensation Act, except with respect to certain covered classes of employees, provides the exclusive

rights and remedy for accidental, employment-related death or personal injury to employees, without reference to negligence on the part of either the employer or the employee. Ind. Code § 22-3-2-6. See also *Waldridge v. Futurex Industries, Inc.*, 714 N.E.2d 783 (Ind. Ct. App. 1999). The exclusivity provision of this statute bars actions brought under other theories, common law or otherwise, by employees, personal representatives, dependents, and next of kin of employees. Ind. Code § 22-3-2-6. So, if the Worker's Compensation Act covers an injury, the courts have no jurisdiction to entertain common law claims against an employer.

Meanwhile, for non-accidental injuries, the Employers' Liability Act (ELA) codifies the common law duty of an employer to protect its employees against the employer's own negligence. It provides that any person, firm, LLC, or corporation with five or more employees is liable in damages for the injury or death of an employee where the injury or death resulted in whole or in part from the negligence of the employer or the employer's agent, servant, employee, or officer, or by reason of any defect, mismanagement, or insufficiency, due to the carelessness, negligence, fault, or omission of duty of the employer or the employer's agent, servant, employee, or officer. Ind. Code § 22-3-9-1.

The ELA does not provide an exclusive remedy for work-related injuries sustained by employees not covered by the Worker's Compensation Act, but merely affords them an alternative remedy for work-related injuries. *City of Hammond v. Biedron*, 652 N.E.2d 110, 112 (Ind. Ct. App. 1995). So, although the statute imposes a monetary penalty ceiling on a plaintiff's recovery for wrongful death, the survivor of an employee killed in a work-related accident is not limited to the amount of recovery specified in the law. *Id.* Damages recoverable under the ELA are to be commensurate with the injuries sustained. Ind. Code § 22-3-9-4.

Employee references and blacklisting: "A person who, after having discharged any employee from his service, prevents the discharged employee from obtaining employment with any other person commits a Class C infraction and is liable in penal damages to the discharged employee to be recovered by civil action." Ind. Code § 22-5-3-1(a). But an employer may write to a person to whom the discharged employee has applied for employment a truthful statement of the reasons for the discharge. *Id.* Blacklisting a former employee via an agent is also prohibited. Ind. Code § 22-5-3-2.

On the other hand, employers who provide a reference for a former employee – or who disclose any information about a current or former employee, for that matter – are immune from civil liability for the proximate consequences of the disclosure, unless it is proven by a preponderance of the evidence that the information disclosed was known to be false at the time the disclosure was made. Ind. Code § 22-5-3-1(b).

Breast feeding accommodation: In Indiana a woman may breast feed her child anywhere she has a right to be. Ind. Code § 16-35-6-1. Private employers with 25 or more employees must provide a private location for breast feeding. Ind. Code § 22-2-14-2.

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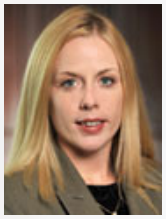
KANSAS

By: Jacqueline M. Sexton



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1. Is the state generally an employment-at-will state?

Yes. Kansas is an employment at-will state, which generally means employees and employers may terminate an employment relationship at any time, for any reason, unless there is an express or implied contract governing the employment's duration. *See Campbell v. Husky Hogs, LLC*, 292 Kan. 225, 227 (2011).

2. Are there any statutory exceptions to the employment-at-will doctrine?

Yes. Kansas recognizes a number of exceptions to the at-will doctrine. There are statutory exceptions to the at-will doctrine as well as exceptions created through Kansas case law. *Id.* For instance, a statutory exception would include the Kansas Act Against Discrimination's prohibition against terminating or otherwise discriminating against an individual because of that individual's race, religion, color, sex, disability, national origin, or ancestry. *See* K.S.A. 44-1009.

Kansas False Claims Act, K.S.A. 5-7506. This statute protects any employee who is discharged, demoted, suspended, threatened, harassed or in any other manner retaliated against in the terms and conditions of employment by the employee's employer because of lawful acts undertaken in good faith by the employee on behalf of the employee or others, in furtherance of an action under the Kansas False Claim Act, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this act, shall be entitled to all relief necessary to make the employee whole. An employee may bring an action in the appropriate district court for the relief provided in this section. This section shall not be construed to create any private cause of action for violations of this act and is limited to the remedies expressly created by this section related to employment retaliation.

K.S.A. § 44-636. An employee may not be discharged (or discriminated against) in retaliation for filing a complaint or otherwise providing information to the Secretary of Labor concerning unsafe or hazardous conditions. Kan. Stat. Ann. § 44-636(f).

Kansas Whistleblower Act, K.S.A.§ 75-2973. An employee of a state agency may not be retaliated against for discussing matter of public concern, including matters relating to public health, safety, and welfare with any member of the legislature or an auditing agency.

K.S.A. § 65-4928. An employee may not be discharged (or discriminated against) for reporting an act by a health care provider that either (1) falls below the applicable standard of care and there is a reasonable chance that it could injure a patient, or (2) would be grounds for disciplinary action by an appropriate licensing agency.

K.S.A. § 44-615. An employee may not be discharged (or discriminated against) in retaliation for testifying as a witness before the Secretary of Labor, signing a complaint, or bringing to the attention of the Secretary of Labor any matter of controversy between employers and employees. This affords protection to those who filed a claim for unemployment compensation benefits.

K.S.A. §§ 39-1403(b), 39-1432(b). An employee may not be discharged in retaliation for making a report or cooperating with an investigation under Kansas laws concerning abuse or neglect of residents of adult family homes or care facilities.

3. Are there any public policy exceptions to the employment-at-will doctrine?

Additionally, Kansas recognizes a public policy exception to the at-will doctrine, which is always expanding. To date, Kansas has recognized public policy exceptions in six circumstances: (1) filing a claim under the Kansas Workers Compensation Act, K.S.A. 44-501, *et seq.*; (2) whistleblowing; (3) filing a claim under the Federal Employers Liability Act, 45 U.S.C. Sec. 51; (4) exercising a public employee's First Amendment right to free speech on an issue of public concern; (5) filing a claim under the Kansas

Wage Payment Act; and (6) exercising employees' rights to appeal their dismissals, demotions, or suspensions under K.S.A. 75-2949. *See Campbell*, 292 Kan. at 228; *Sage Hill v. State*, 53 Kan. App. 2d 155, 184 (2016). The Kansas courts determined that these exceptions were necessary to protect a strongly held state public policy from being undermined. *Sage Hill*, 53 Kan. App. 2d at 184.

4. Is there any law related to the hiring process?

While there are no specific laws related generally to the hiring process, many of the statutory laws related to employment apply equally to the hiring process. For instance, the Kansas Act Against Discrimination prohibits discrimination based on a protected class status in the hiring process.

K.S.A. § 44-1009. It shall be an unlawful employment practice for any employer, employment agency or labor organization to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or membership or to make any inquiry in connection with prospective employment or membership, which expresses, directly or indirectly, any limitation, specification or discrimination as to race, religion, color, sex, disability, national origin or ancestry, or any intent to make any such limitation, specification or discrimination, unless based on a bona fide occupational qualification.

K.S.A. § 44-1009(9). It shall be an unlawful employment practice for any employer to seek to obtain, to obtain or to use genetic screening or testing information of an employee or a prospective employee to distinguish between or discriminate against or restrict any right or benefit otherwise due or available to an employee or a prospective employee or to subject, directly or indirectly, any employee of prospective employee to any genetic screening or test.

The Kansas Fair Credit Reporting Act applies to consumer credit reports and provides a consumer reporting agency may furnish a report to a person who it which it has reason to believe intends to use the information for employment purposes. K.S.A. 50-703. The KFCRA applies to background reports for employment purposes that contain information related to arrests, indictments, convictions, suits, tax liens, and outstanding judgments. K.S.A. 50-713. The Act provides any user of information (which would include an employer) that willfully fails to comply with the requirements of the act, including certain notice provisions, is liable to the consumer for an amount equal to the sum of any actual damages, punitives, and in the case of any successful action to enforce any liability the costs of the action together with reasonable attorney's fees as determined by the Court. K.S.A. 50-715. If the user is responsible for negligent noncompliance, actual damages as well as costs with reasonable attorney's fees are recoverable. The KFCRA provides for a private right of action that must be initiated within two years from the date on which liability arose. K.S.A. 50-717.

5. Does the state recognize implied employment contracts under employment handbooks, policies, or practices?

An implied-in-fact contract may be established by an employment handbook, employment policies, verbal discussions, employer's past conduct, and/or based on the employer's course of dealing. An implied-in-fact contract recognizes an implied obligation on the employer to not terminate an employee arbitrarily where a policy or program of the employer, either express or implied, restricts the employer's right to terminate the employee under the at-will doctrine. *Stover v. Superior Industries Intern, Inc.*, 29 Kan. App. 2d 235 (2000). The determination of whether an implied-in-fact contract exists is generally a question of fact for the jury. *Id.* at 239. An employer, however, can prevail on summary judgment if the employee only presents evidence of his or her "unilateral expectations of continued employment." *Inscho v. Exide Corp.*, 29 Kan. App. 2d 892, 896 (2001).

6. Does the state have a right to work law or other labor / management laws?

Yes, Kansas passed a right-to-work amendment to the state constitution in 1958, and added statutory provisions in 1975 that allow for a civil lawsuit in case of a constitutional violation. Kansas Constitution Article XV Sec. 12; K.S.A. 44-831. There is a cause of action if there is a constitutional violation. Kansas law prohibits the denial of the opportunity to obtain or retain employment or continuance of employment based on membership or non-membership in any labor organization. An agreement to exclude an individual from employment based on membership in a labor organization is prohibited. Damages and attorney's fees are recoverable.

7. What tort claims are recognized in the employment context?

Tort claims for the tort of outrage, intentional infliction of emotional distress, negligent infliction of emotional distress, assault/battery, invasion of privacy, defamation, tortious interference with a business contract (or business expectancy) and fraud are all cognizable claims in the employment context.

Tort of Outrage

The Kansas Supreme Court has defined the tort of outrage as follows:

"One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress. [Citations omitted.] Proof of four elements is required to establish the cause of action: (1) The conduct of defendant must be intentional or in reckless disregard of plaintiff; (2) the conduct must be extreme and outrageous; (3) there must be a causal connection between defendant's conduct and plaintiff's mental distress; and (4) plaintiff's mental distress must be extreme and severe.

See Taiwo v. Vu, 249 Kan. 585 (1991) (citing *Roberts v. Saylor*, 230 Kan. 289 (1981)).

"Liability for extreme emotional distress has two threshold requirements which must be met and which the court must, in the first instance, determine: (1) Whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery; and (2) whether the emotional distress suffered by plaintiff is in such extreme degree the law must intervene because the distress inflicted is so severe that no reasonable person should be expected to endure it." *Id.* (citing *Roberts*, 230 Kan. at 292–93, 637 P.2d 1175).

Intentional Infliction of Emotional Distress

A claim for intentional infliction of emotional distress will stand when the plaintiff can establish proof of the following four elements: (1) The conduct of defendant must be intentional or in reckless disregard of plaintiff; (2) the conduct must be extreme and outrageous; (3) there must be a causal connection between defendant's conduct and plaintiff's mental distress; and (4) plaintiff's mental distress must be extreme and severe. *See Lindemuth v. Goodyear Tire & Rubber Co.*, 19 Kan. App. 2d 95 (1993).

Negligent Infliction of Emotional Distress

With respect to negligent infliction of emotional distress, there can be no recovery for emotional distress caused by the negligence of another unless accompanied by or resulting in physical injury occurring contemporaneously with or shortly after the incident causing the emotional distress. *Payne v. General Motors Corp.*, 731 F. Supp. 1465 (D. Kan. 1990)(citing *Anderson v. Scheffler*, 242 Kan. 857 (1988)).

Defamation

Defamation includes both libel and slander. The elements of the wrong include false and defamatory words communicated to a third person which result in harm to the reputation of the person defamed. *See Lindemuth v. Goodyear Tire & Rubber Co.*, 19 Kan. App. 2d 95 (1993). A corporation may be liable for the defamatory utterances of its agent which are made while acting within the scope of his authority. *Id.* (citing *Bourn v. State Bank [Beck]*, 116 Kan. 231, 235, 226 Pac. 769 (1924); *Luttrell v. United Telephone System, Inc.*, 9 Kan. App. 2d 620, 620–21, 683 P.2d 1292 (1984), aff'd 236 Kan. 710, 695 P.2d 1279 (1985)). Employees are allowed a qualified privilege which extends protection to certain comments made within a work situation. *Id.* (citing *Luttrell*, 9 Kan. App. 2d at 622, 683 P.2d 1292).

"A communication is qualifiedly privileged if it is made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a duty, if it is made to a person having a corresponding interest or duty. *Id.* The essential elements of a qualifiedly privileged communication are good faith, an interest to be upheld, a statement limited in its scope to the upholding of such interest and publication in a proper manner only to proper parties." *Id.* (citing *Luttrell*, 9 Kan. App. 2d at 622, 683 P.2d 1292. When a conditional or qualified privilege exists, a plaintiff must demonstrate actual malice, requiring the plaintiff to prove that the publication was made with knowledge that the defamatory statement was false or was made with reckless disregard of whether it was false or not. *Id.* (citing *Dobbyn v. Nelson*, 2 Kan. App. 2d 358, 360, 579 P.2d 721, aff'd 225 Kan. 56, 587 P.2d 315 (1978)).

Invasion of Privacy

With respect to invasion of privacy, there are four recognized claims in Kansas, which may be brought in the employment context: (1) unreasonable intrusion upon the seclusion of another; (2) appropriation of another's name or likeness; (3) unreasonable publicity given to another's private life; and (4) publicity that unreasonably places another in a false light before the public. *Finlay v. Finlay*, 18 Kan. App. 2d 479 (1993)(citing Restatement (Second) of Torts, Sec. 652A (1976)).

Tortious Interference

For a claim of tortious interference, the elements are as follows: (1) the existence of a business relationship or expectancy with the probability of future economic benefit to the plaintiff; (2) knowledge of the relationship or expectancy by the defendant; (3) that, except for the conduct of the defendant, plaintiff was reasonably certain to have continued the relationship or realized the expectancy; (4) intentional misconduct on the part of the defendant; and (5) damages suffered by the plaintiff as a direct result of defendant's conduct. *See Turner v. Haliburton Co.*, 240 Kan. 1 (1986).

Fraud

To prove fraud, the employee must show that an untrue statement of material facts, known to be untrue by the party making it, or made with reckless disregard for the truth, was justifiably relied upon by the party alleging fraud and as a result of the reliance was damaged. *See Hutchinson Travel Agency, Inc. v. McGregor*, 10 Kan. App. 2d 461 (1985)(citing *Weigand v. Union Nat'l Bank of Wichita*, 227 Kan. 747, 753, 610 P.2d 572 (1980); *Nordstrom v. Miller*, 227 Kan. 59, Syl. ¶ 6, 605 P.2d 545 (1980); *Sippy v. Cristich*, 4 Kan. App. 2d 511, 514, 609 P.2d 204 (1980)). Reliance in a fraudulent misrepresentation case must be reasonable, justifiable and detrimental. *Id.* (relying on *Goff v. American Savings Association*, 1 Kan. App. 2d 75, 79-82, 561 P.2d 897 (1977)).

8. Is there a common law or statutory prohibition against discrimination / hostile work environment?

Yes. The Kansas Act Against Discrimination ("KAAD") applies to employers with 4 or more employees. K.S.A. Secs. 44-1001 to 44-1014 and 44-1111 to 44-1121. The definition of employer under the act includes any person acting directly or indirectly for an employer, labor organizations, nonsectarian corporations, organizations engaged in social service work and the state of Kansas and all political and municipal subdivisions. It prohibits discrimination on the basis of race, religion, color, sex (including pregnancy), disability, national origin, and ancestry. Since 1999, the KAAD has also prohibited discrimination on the basis of genetic screening or testing.

In Kansas, a verified complaint must be filed with the Kansas Human Rights Commission within six months from the last alleged discriminatory act. K.S.A. 44-1005. A person seeking to pursue a claim under the KAAD must first exhaust his or her administrative remedies prior to filing a civil suit. *Hughs v. Valley State Bank*, 26 Kan. App. 2d 631 (1999).

Once a complaint is filed, the Kansas Human Rights Commission serves a copy of the complaint on the respondent and then begins to conduct an investigation into the allegations. *See* K.S.A. 44-1005(a), (d), & (i). The KHRC determines if probable cause exists to credit the allegations. *See Sandlin v. Roche Laboratories, Inc.*, 268 Kan. 79, 83 (1999). If the KHRC determines that probable cause does not exist to credit the allegations, the Complainant is provided notice of the determination, which is not subject to judicial review. *Id.; see also* K.S.A. 44–1005(d); *Van Scoyk v. St. Mary's Assumption Parochial School*, 224 Kan. 304 (1978). However, if the KHRC determines that there is probable cause, it proceeds by conference and conciliation in an attempt to stop the alleged discriminatory practice. *Id.*; *see also* K.A.R. 44–1005(e). If an agreement is not reached, the commission proceeds with a hearing. *Id.*; K.S.A. 44–1005(f).

The hearing officer's decision is reviewed by the KHRC and a copy of the final order is served on the parties. *Id.*; K.S.A. 44–1005(n). Any party not satisfied with the final order may petition for reconsideration within 15 days of service under the Kansas Administrative Procedures Act, which is generally a perquisite to obtaining judicial review. *Id.*; K.S.A. 77-529(a); K.S.A. 44–1010. Finally, a Complainant may also bring an independent cause of action in the district court once he or she has exhausted administrative remedies. *Sandlin*, 268 Kan. at 84.

Also, complaints shall be dismissed by the KHRC upon the written request of the Complainant if the KHRC has not issued a finding of probable case or no probable cause or taken other administrative action dismissing the complaint within 300 days of the filing. *See* K.S.A. 44-1005(i). Thanks to the 1995 amendments to the KAAD such a dismissal is a final action which shall be deemed to exhaust all administrative remedies under the KAAD, allowing a Complainant to proceed directly with the filing of a civil action without the need of filing a petition for reconsideration. *Id.*

A Complainant may bring a claim under the KAAD in either state court or the federal district court where the discrimination or retaliation occurred. *Van Scoyk v. St. Mary's Assumption Parochial Sch.*, 224 Kan. 3045 (1978). The KAAD provides for a jury trial, assuming a jury trial demand is timely made. K.S.A. 60-238. Unless the parties stipulate to a lesser number of jurors, the jury panel consists of 12 jurors. K.S.A. 60-248. If there are twelve jurors, then there must be agreement by ten of the twelve. *Id.*

Since 1988, the KADEA protected individuals 18 years of age or greater from age discrimination. In 2008, the act was amended and the definition of age was changed to 40 or more years. Kansas courts use the ADEA's summary judgment burden-shifting framework to analyze claims asserted under the KADEA. *See Forbes v. Kinder Morgan, Inc.*, 172 F. Supp. 3d 1182 (D. Kan. 2016)(citing *Beech Aircraft Corp. v. Kan. Human Rights Comm'n*, 254 Kan. 270, 272-73 (1993))

In 2012, the disability provisions of the act were amended to bring them into alignment with the ADAAA of 2008. The definition of "regarded as" was expended and, further, established that a person "regarded as" having a physical or mental impairment is not entitled to a reasonable accommodation. The amended act also modified the definition of "major life activities". Furthermore, the amendments established that an impairment that substantially limits only one major life activity may be consider a disability. Furthermore, it provided that an impairment that is episodic or in remission is a disability if it substantially limits a major life activity when active. Like the ADAAA, it was also revised to provide that the determination as to whether an impairment substantially limits a major life activity shall be made without the regard to the effect of mitigating measures, such as medication, equipment, or technology. Contact lenses and eyeglasses will continue to be considered.

9. Is there a common law or statutory prohibition of retaliation?

a. Discrimination Claims

The KAAD and KADEA prohibit retaliation against an individual who has opposed discrimination, filed a complaint or testified or assisted in a proceeding under the law. A plaintiff has a right to a jury trial so long as a jury demand is timely made. Damages include back pay, front pay, and other out of pocket costs. Pain and suffering damages are limited to $2,000.00. The KAAD does not allow for an award of punitive damages.

b. Workers' Compensation Claims

One exception to the employment-at-will doctrine exists when an employer retaliates against an injured worker for exercising the employee's rights under the Kansas Workers Compensation Act, K.S.A. 44-501 et seq. Kansas law recognizes an employer who retaliates against an employee for invoking the right to file a workers' compensation claim contravenes the public policy of the state and states an actionable retaliation claim under the common law of the state. Generally, the employee must have filed a claim or suffered an injury for which he might assert a workers' compensation claim.

c. Military Service

K.S.A. 44-1125, et seq. It is unlawful to refuse to hire, discharge, or otherwise discriminate against an employee because of his membership in the U.S. armed forces, reserves, or national guard. Sec. 44-1125 allows for a private right of action.

d. Political Activities

K.S.A. 25-4169a. No officer or employee of the state shall use or authorize the use of public funds or vehicles, machinery, equipment or supplies or the time of any officer or employee, for and by which the officer or employee is compensated, to expressly advocate the nomination, election or defeat of a clearly identified candidate to state office or local office.

K.S.A. 75-2953. No officer, agent, clerk or employee of this state shall directly or indirectly use their authority or official influence to compel any officer or employee in the unclassified and classified services to apply for membership in or become a member of any organization, or to pay or promise to pay any assessment, subscription or contribution, or to take part in any political activity. Any officer or employee in the state classified service shall resign from the service prior to taking the oath of office for a state elective office.

e. Medical Leaves

If medical leave was authorized as a reasonable accommodation under the KAAD, the Act would prohibit retaliation.

f. Maternity/Paternity Leaves

The administrative regulations interpreting the KAAD require covered employers to allow employees to take a "reasonable" period of leave while they are temporarily unable to work due to pregnancy, childbirth, or recovery from these conditions. Employees must be reinstated when their leave is through.

g. Whistle Blowing

Kansas Whistleblower Act, K.S.A. § 75-2973. An employee of a state agency may not be retaliated against for discussing matter of public concern, including matters relating to public health, safety, and welfare with any member of the legislature or an auditing agency.

K.S.A. § 44-615. An employee may not be discharged (or discriminated against) in retaliation for testifying as a witness before the Secretary of Labor, signing a complaint, or bringing to the attention of the Secretary of Labor any matter of controversy between employers and employees. This provision protects employees who testify in unemployment compensation proceedings.

K.S.A. §§ 39-1403(b), 39-1432(b). An employee may not be discharged in retaliation for making a report or cooperating with an investigation under Kansas laws concerning abuse or neglect of residents of adult family homes or care facilities.

h. Safety Complaints

K.S.A. § 44-636(f). An employee may not be discharged (or discriminated against) in retaliation for filing a complaint or otherwise providing information to the Secretary of Labor concerning unsafe or hazardous conditions.

i. Voting

K.S.A. 25-418 provides employees with the right to take paid leave to vote at an election conducted by a county election officer in Kansas on the day of the election. Generally, it permits an employee to take up to two (2) consecutive hours paid leave, without penalty, between the time of opening and closing of polls for the purpose of voting. Interfering with an

employee's rights under this law is a Class A misdemeanor. Although the statute does not provide a private right of action, a violation of the statute would fall within the common law public policy exception to the employment at-will doctrine.

j. Jury Duty/Court Attendance

K.S.A. 43-173 provides that no employer shall discharge or threaten to discharge any permanent employee because of the employee's jury service in any court of Kansas. An employer that violates the statute shall be liable for any loss of wages, actual damages and other benefits suffered by the employee as a result of the employer's violation. *Id.* The statute provides for reinstatement without the loss of seniority of any employee fired because of his or her jury service. Id. It also allows for injunctive relief. *Id.* The statute provides for an award of reasonable attorney fees to a prevailing employee. A prevailing employer may also recover reasonable attorney fees but only if the court finds that the action was frivolous or brought in bad faith. *Id.*

10. Is the state a deferral state for charges filed with the EEOC?

Yes, in Kansas, an individual has 300 days from the date of alleged harm to file a charge with the EEOC against an employer with 15 or more employees for discrimination based on race, color, national origin, sex, religion, and/or disability. Likewise, an individual has 300 days from the date of alleged harm to file a charge with the EEOC against an employer with 20 or more employees for discrimination based on age. Charges against employers of less than 15 employees (for race, color, national origin, sex, religion, and/or disability) or less than 20 employees (for age) must be filed with the Kansas Human Rights Commission within 180 days.

11. Are there any state laws related to compensation, including wage and hour, paid time off, mandatory breaks, fringe benefits, allowable deductions, prevailing wage rates for public contracts, etc.?

The Kansas Wage Payment Act governs the payment of wages and benefits, including the timing of payment, withholding and required notifications, as well as payment upon separation from employment. Employers must pay all wages due at least once during each calendar month on regular paydays designated in advance by the employer. K.S.A. 44-314(a). The law further provides that the end of the pay period for which payment is made on a regular payday shall be not more than 15 days before such regular payday unless a variance in such requirement is authorized by state or federal law. K.S.A. 44-314(h). A wage claim can be made through the Kansas Department of Labor or, alternatively, through a private lawsuit. K.S.A. 44-322a and 44-324.

If the employer willfully fails to pay an employee wages, the employer is liable for the wages due plus a penalty of the lesser amount of either: the fixed amount of 1% of the unpaid wages for each day, except Sunday and legal holidays, upon which such failure continues beginning on the 9th day after payment is required; or 100% of the unpaid wages. The filing of a petition in bankruptcy or the filing of an appeal may stop the accrual of penalties against the employer. K.S.A. 44-315.

K.S.A. 44-319. Withholding of wages, limitations on; deductions from wages, when allowed.

(a) Except as provided in subsections (b) and (c), no employer may withhold, deduct or divert any portion of an employee's wages unless: (1) The employer is required or empowered to do so by state or federal law; (2) the deductions are for medical, surgical or hospital care or service, without financial benefit to the employer, and are openly, clearly and in due course recorded in the employer's books; (3) the employer has a signed authorization by the employee for deductions for a lawful purpose accruing to the benefit of the employee; or (4) the deductions are for contributions attributable to automatic enrollment, as defined in K.S.A. 2017 Supp. 44-319a, and amendments thereto, in a retirement plan established by the employer described in sections 401(k), 403(b), 408, 408A or 457 of the internal revenue code.

(b) Subject to the provisions of subsection (e), pursuant to a signed written agreement between the employer and employee, an employer may withhold, deduct or divert any portion of an employee's wages for the following purposes: (1) To allow the employee to repay a loan or advance which the employer made to the employee during the course of and within the scope of employment; (2) to allow for recovery of payroll overpayment; and (3) to compensate the employer for the replacement cost or unpaid balance of the cost of the employer's merchandise or uniforms purchased by the employee.

(c) Subject to the provisions of subsection (e), upon providing a written notice and explanation, an employer may withhold, deduct or divert any portion of an employee's final wages for the following purposes: (1) To recover the employer's property provided to the employee in the course of the employer's business including, but not limited to, tools of the trade or profession, personal safety equipment, computers, electronic devices, mobile phones, proprietary information such as client or customer lists and intellectual property, security information, keys or access cards or materials until such time as such property is returned by the employee to the employer. Upon return of the employer's property, the employer shall relinquish the wages withheld to the employee; (2) to allow an employee to repay a loan or advance which the employer made to the employee during the course of and within the scope of employment; (3) to allow for the recovery of payroll overpayment; or (4) to

compensate the employer for the replacement cost or unpaid balance of the cost of the employer's merchandise, uniforms, company property, equipment, tools of the trade or other materials intentionally purchased by the employee.

(d) Nothing in this section shall be construed as prohibiting the withholding of amounts authorized in writing by the employee to be contributed by the employee to charitable organizations; nor shall this section prohibit deductions by check-off of dues to labor organizations or service fees, where such is not otherwise prohibited by law.

(e) Amounts withheld under this section shall not reduce wages paid to below the minimum wage required under the federal fair labor standards act, 29 U.S.C.A. § 201 et seq., or the minimum wage required under K.S.A. 44-1203, and amendments thereto, whichever is applicable.

12. Is there a state statute governing paid or unpaid leaves?

The KAAD, through its regulations, requires employers to provide a leave of absence to a female employee for childbearing for a reasonable period of time, which leave period is not defined. K.A.R. 21-32-6 provides that a written or unwritten policy of practice which excludes from employment applicants or employees because of pregnancy is prima facie discrimination. The regulation provides that pregnancy and disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth or recovery, are for all job related purposes, temporary disabilities and should be treated as such under any sick leave plan. Specifically, the regulation provides that any policy related to the duration of leave, the accrual of benefits and seniority, reinstatement, and payment, should be applied to disabilities due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities. *Id.* Finally, it provides that childbearing must be considered by the employer to be a justification for leave of absence for female employees for a reasonable period of time. Likewise, it provides a female employee that signifies her intent to return within a reasonable time shall be reinstated to her original job or to a position of like status and pay without loss of service, credits, seniority or other benefits. *Id.* Similarly, medical leave may be required as a reasonable accommodation for a disability under the KAAD.

Military

K.S.A. 48-222. Private employers must grant unpaid leave to any employee who is a member of the Kansas National Guard to attend drills or annual muster or perform active service. Employers may not discharge or punish an employee for absences due to the performance of military duty.

K.S.A. 48-225. Leave for military duty is without pay. Members of the state National Guard are entitled to reimbursement of the cost of privately purchased or employer-provided health insurance if the insurance policy was in force before the employee was ordered to perform active state service. Reimbursement by the state is only available during any period or consecutive periods of state active duty in excess of 30 days.

Additionally, K.S.A. 48-517, 44-1125 to 44-1128 relate to the provision of military leave. Sections 48-517 and 48-222 do not provide for a private right of action. However, under the common law, a violation of these statutes likely falls within the public policy exceptions to employment “at-will”. Sections 44-1125 through 44-1128, however, do provide for a private right of action.

Voting

K.S.A. 25-418 provides employees with the right to take paid leave to vote at an election conducted by a county election officer in Kansas on the day of the election. Generally, it permits an employee to take up to two (2) consecutive hours paid leave, without penalty, between the time of opening and closing of polls for the purpose of voting. Interfering with an employee’s rights under this law is a Class A misdemeanor. Although the statute does not provide a private right of action, a violation of the statute would fall within the common law public policy exception to the employment at-will doctrine.

Jury duty

K.S.A. 43-173 provides that no employer shall discharge or threaten to discharge any permanent employee because of the employee’s jury service in any court of Kansas. An employer that violates the statute shall be liable for any loss of wages, actual damages and other benefits suffered by the employee as a result of the employer’s violation. *Id.* The statute provides for reinstatement without the loss of seniority of any employee fired because of his or her jury service. *Id.* It also allows for injunctive relief. *Id.* The statute provides for an award of reasonable attorney fees to a prevailing employee. A prevailing employer may also recover reasonable attorney fees but only if the court finds that the action was frivolous or brought in bad faith. *Id.*

13. Is there a state law governing drug-testing?

Kansas does not have a statute that governs drug testing in employment. Kansas recognizes employer policies that require drug testing as a condition of employment. *See Frye v. IBP, Inc.*, 15 F. Supp. 2d 1032 (D. Kan. 1998)(citing K.S.A. 44-706(b)(discussing what constitutes employee misconduct for purpose of unemployment benefits).

14. Is there a medical marijuana statute?

No.

15. Is there trade secret / confidential information protection for employers?

Yes. K.S.A. 60-3320 through 60-3330, Kansas Uniform Trade Secret Act. Under the Act, “trade secret” is defined as information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Damages for misappropriation can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. In lieu of damages measured by any other methods, the damages caused by misappropriation may be measured by imposition of liability for a reasonable royalty for a misappropriator’s unauthorized disclosure or use of a trade secret. If willful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award made under subsection (a). K.S.A. 60-3322.

16. Is there any law related to employee's privacy rights?

With respect to invasion of privacy, there are four recognized claims in Kansas, which may be brought in the employment context: (1) unreasonable intrusion upon the seclusion of another; (2) appropriation of another’s name or likeness; (3) unreasonable publicity given to another’s private life; and (4) publicity that unreasonably places another in a false light before the public. *Finlay v. Finlay*, 18 Kan. App. 2d 479 (1993)(citing Restatement (Second) of Torts, Sec. 652A (1976)).

17. Is there any law restricting arbitration in the employment context?

No. Arbitration agreements in employment are enforceable under Kansas Law. *See Bolden v. AT&T Services, Inc.*, 2018 WL 4913901 (D. Kan. October 10, 2018).

School District Employment Contracts, K.S.A. 72-2229. Agreements may provide for arbitration of disputes; enforcement of arbitration agreements.

(a) A board of education and a professional employees' organization who enter into an agreement covering terms and conditions of professional service may include in such agreement procedures for final and binding arbitration of such disputes as may arise involving the interpretation, application or violation of such agreement.

(b) Where a party to such agreement is aggrieved by the failure, neglect or refusal of the other party to proceed to arbitration in the manner provided for in such agreement, such aggrieved party may file a complaint in court for a summary action without jury seeking an order directing that the arbitration proceed in the manner provided for in such agreement.

K.S.A. 2018 Supp. 5-423 through 5-453 applies to an agreement to arbitrate made after July 1, 2018.

18. Is there any law governing weapons in the employment context?

In Kansas, public and private employers may restrict the ability of employees licensed to carry concealed weapons while they are performing their jobs; however, they must post their buildings with signs. *See* Kansas Admin. Reg. Sec. 12-16-124. Employer may not restrict licensed employees from storing firearms in their vehicles, even if vehicles are parked on company property.

19. Miscellaneous employment or labor laws not discussed above?

Kansas Child Labor Law (K.S.A. 38-601 et. seq.)

This law regulates the employment of workers under 18 years of age for employers that are not covered by the Fair Labor Standards Act. Under the Kansas child labor laws, workers under 14 years of age (with a few exceptions) cannot be employed. K.S.A. 38-601 and 38-614. With limited exceptions, children under 16 years of age may be employed a maximum of 40 hours a week and eight hours a day. K.S.A. 38-603. Those employers that employ children under 16 years of age must obtain and keep on file a child labor permit; however, the permit is not required if the child is enrolled or attending secondary school within Kansas. K.S.A. 38-604.

These laws also protect children by prohibiting work in hazardous occupation for children under 18 years of age. Additionally, children under the age of 16 are further restricted from working in certain fields, such as manufacturing or transportation. The laws also limit the number of hours that may be worked for children 14 and 15 years of age. These laws are enforced through the Kansas Labor Commissioner and his or her deputies. They are tasked with inspecting premises for violation and filing complaints to enforce these child labor laws. The county attorney is responsible for appearing and prosecuting complaints filed on behalf of the commissioner.

KENTUCKY

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1. Is the state generally an employment-at-will state?

Kentucky is generally considered an "at-will" employment state, absent an agreement between the parties to the contrary. See, generally, *Wymer v. JH Properties, Inc.*, 50 S.W.3d 195 (Ky. 2001). Unless the reason for the termination is otherwise prohibited by law, an employer may terminate an employee for good cause, no cause, or even cause that "some might view as morally reprehensible." *Id*.

2. Are there any statutory exceptions to the employment-at-will doctrine?

There are a number of statutory exceptions to employment-at-will. Among the most frequently occurring:

a. "Whistleblower" protection – This protection extends to both i) public sector and ii) private sector employees, although the specifics are slightly different. Public-sector employers may not discharge employees for either making a report in good faith to any one of several state entities regarding concerns of violation of applicable law, statutes, executive order, administrative regulation, mandate, rule or ordinances; or making reports regarding actual or suspected mismanagement, waste, fraud, abuse of authority, or substantial and specific dangers to public health/safety. KRS 61.102. In the private sector, certain limited types of employers are likewise restrained from discharging employers for making similar types of reports, such as health care facilities. KRS 216.165. And as elaborated further infra,

b. Kentucky Civil Rights Act – employees may not be discharged for opposing unlawful discrimination practices, nor in retaliation for filing a complaint, testifying, assisting, or participating in an investigation, proceeding, or hearing concerning unlawful discrimination. KRS 344.280. Moreover, employees may not be discriminated against (including discharge) on the basis of gender, age (40 and over), race, religion, national origin, disability, or status as a smoker or non-smoker. KRS 344.040.

c. Medical assistance fraud – an employee may not be discharged in retaliation for filing a report, or testifying in a proceeding concerning fraud on a state-run medical assistance program. KRS 205.8465(3).

d. Minimum wage or wage and hour complaints – employees may not be discharged in retaliation for filing a complain, instituting a proceeding, or testifying in a proceeding concerning a violation of Kentucky minimum wage laws. KRS 337.990(9).

e. Mining – employees may not be discharged in retaliation for testifying or failing to testify at any hearing before the Kentucky Department of Natural Resources concerning mining. KRS 351.030.

f. Gender-based wage discrimination – employees may not be discharged for assisting in the enforcement of laws prohibiting wage discrimination on the basis of gender. KRS 337.423(4).

g. Workers' Compensation – employees may not be discharged for filing or pursuing a workers' compensation claim. KRS 342.197. While this does not permit an employer from eventually terminating the employment of an injured worker because of their work status/inability to work, the fact of having sought workers' compensation benefits cannot be a substantial motivating factor in the employment decision.

h. OSHA complaints – employees may not be discharged for filing a complaint, instituting proceedings, testifying in proceedings, or exercising a right concerning Kentucky's occupational safety and health laws. KRS 338.121(3).

3. Are there any public policy exceptions to the employment-at-will doctrine?

Yes. Kentucky recognizes a common-law "public policy" exception to the employment-at-will doctrine. The "public policy" exception broadly covers where the discharge is a) contrary to fundamental and well-defined public policy as evidenced by existing law; and b) that policy in question is evidenced by a statutory or constitutional provision. For example, the "public policy" exception encompasses terminating an employee for the exercise of a right specifically provided by statute. See *Mitchell v. University of Kentucky*, 366 S.W.3d 895 (Ky. 2012) (where statute provided express right for person to carry weapon in vehicle with proper permit, university could not terminate individual's employment for having vehicle on campus with weapon inside). The "public policy" exception also protects individuals from being terminated for refusing to violate a law in the course of their employment, or for refusing to commit conduct in the course of their employment that would subvert a legislative priority (i.e., being encouraged to not report sexual harassment or racial discrimination).

Employees who have been terminated for a reason contrary to "public policy" have the right to seek an award of damages in a jury trial in a Kentucky court. Recoverable damages include back and front pay, and punitive damages are available for particularly egregious violations of the "public policy" doctrine. Because this cause of action is not specifically provided for by statute, there is no statutory (or for that matter, common law) provision that will permit an award of attorney's fees to the prevailing party.

4. Is there any law related to the hiring process?

Kentucky does not have broad restrictions relating to the hiring process and investigation of a prospective employee's background. Most has developed under common law, and involve a prospective employer's use of information obtained in their investigation of the employee:

a. Invasion of privacy is a tort action recognized in Kentucky. *McCall v. Louisville Courier-Journal & Louisville Times Co.*, 623 S.W.2d 882 (Ky. 1981). So is the tort of "false light," meaning that where the prospective employer recklessly takes action to disseminate information about the plaintiff that turns out to be false, they can be held liable. Id.

b. Drug-testing of prospective employees has been discussed in prior opinions, and has not been proclaimed to be lawful nor has it been declared unlawful. See *Smith v. Kentucky Unemployment Insurance Commission*, 906 S.W.2d 362 (Ky. App. 1995). The prevailing practice in Kentucky is to conduct drug testing of employees both on a prospective and ongoing basis, provided that the employer has an articulated policy for conducting such test and permission/acquiescence is given by the employee.

c. Physical examination – Where shown to be rationally related to the job duties, Kentucky generally permits the conduct of such examinations. See Honaker v. Duro Bag Mfg. Corp., 851 S.W.2d 481 (Ky. 1993). Of course, employers must also be careful of the mandates of the Americans With Disabilities Act when conducting such examinations, provided they are subject to the ADA's provisions.

d. Background checks – By recognizing the tort of "negligent hiring," Kentucky common law encourages employers to conduct criminal or other investigations into the background of potential employees, so that they are not subjecting the public to a heightened risk of harm. See *Oakley v. Flor-Shin, Inc.*, 964 S.W.2d 438 (Ky. App. 1998).

5. Does the state recognize implied employment contracts under employment handbooks, policies, or practices?

Employment manuals, provided they have sufficient disclaimers as to any expectation of employment other than at-will, cannot result in any "breach of contract" claim for the termination of employment. See, generally, *Wathen v. General Elec. Co*., 115 F.3d 400 (6th Cir. 1997); *Noel v. Elk Brand Mfg. Co*., 53 S.W.3d 95 (Ky. App. 2000).

6. Does the state have a right to work law or other labor / management laws?

In 2017, the Kentucky legislature passed a "right to work" law (House Bill 1) for the first time. The essence of this new law leaves existing unexpired union contracts unchanged. But effective immediately, no union contract with an employer can require an employee to pay union dues or joint a labor union as a pre-condition to employment; those choices must be voluntary on behalf of the employee. In tandem with this protection, workers must affirmatively "opt in" to the withholding of union dues from their paychecks; previoudly, a worker must have affirmatively "opted out."

7. What tort claims are recognized in the employment context?

Kentucky generally limits the availability of tort claims arising out of personal injuries relating to one's ongoing employment, against an employer or an employee. During the existence of the employment relationship, KRS 342.690 provides that as long as an employer has valid workers' compensation insurance coverage and the employee has not opted out of Kentucky's

otherwise mandatory workers' compensation act, the employer (and for that matter, any other fellow employee) is not liable to the employee for civil damages unless an employee suffers injury that is proximately caused by the "willful and unprovoked physical aggression" of another employee. KRS 342.690.

Traditional common-law torts that do not result in physical injuries (i.e., intentional infliction of emotional distress, libel/defamation) are not affected by KRS 342.690. Employees (whether former or current) may have causes of action against their employer for these common-law torts and may be held liable in civil lawsuits for all compensatory damages, including punitive where the conduct is particularly egregious.

8. Is there a common law or statutory prohibition against discrimination / hostile work environment?

Yes. The Kentucky Civil Rights Act (KRS Chapter 344; KRS 344.040 specifically) prevents discrimination based upon race, color, religion, national origin, gender, age (40 and over) disability, or status as a smoker/non-smoker. Remedies include back pay, front pay, injunctive relief and compensatory damages for emotional distress/humiliation. Employees may enforce these rights via civil suit. A prevailing party may seek the recovery of attorneys' fees and taxable costs of the lawsuit, but they are not entitled to punitive damages as the provisions of the KCRA limit monetary remedies to "actual damages." A jury trial is available.

9. Is there a common law or statutory prohibition of retaliation?

Yes, see section 2 above. In addition:

a. "Whistleblower" protection – This protection extends to both i) public sector and ii) private sector employees, although the specifics are slightly different. Public-sector employers may not discharge employees for either making a report in good faith to any one of several state entities regarding concerns of violation of applicable law, statutes, executive order, administrative regulation, mandate, rule or ordinances; or making reports regarding actual or suspected mismanagement, waste, fraud, abuse of authority, or substantial and specific dangers to public health/safety. KRS 61.102. In the private sector, certain limited types of employers are likewise restrained from discharging employers for making similar types of reports, such as health care facilities. KRS 216.165.

b. Kentucky Civil Rights Act – employees may not be discharged for opposing unlawful discrimination practices, nor in retaliation for filing a complaint, testifying, assisting, or participating in an investigation, proceeding, or hearing concerning unlawful discrimination. KRS 344.280. Moreover, employees may not be discriminated against (including discharge) on the basis of gender, age (40 and over), race, religion, national origin, disability, or status as a smoker or non-smoker. KRS 344.040.

c. Medical assistance fraud – an employee may not be discharged in retaliation for filing a report, or testifying in a proceeding concerning fraud on a state-run medical assistance program. KRS 205.8465(3).

d. Minimum wage – employees may not be discharged in retaliation for filing a complaint, instituting a proceeding, or testifying in a proceeding concerning a violation of Kentucky minimum wage laws. KRS 337.990(9).

e. Mining – employees may not be discharged in retaliation for testifying or failing to testify at any hearing before the Kentucky Department of Natural Resources concerning mining. KRS 351.030.

f. Gender-based wage discrimination – employees may not be discharged for assisting in the enforcement of laws prohibiting wage discrimination on the basis of gender. KRS 337.423(4).

g. Workers' Compensation – Right to a jury trial exists. Actual damages are recoverable, including back pay and front pay. A prevailing plaintiff may recover their attorneys' fees and taxable costs. Punitive damages are not recoverable, however.

h. OSHA complaints – employees may not be discharged for filing a complaint, instituting proceedings, testifying in proceedings, or exercising a right concerning Kentucky's occupational safety and health laws. KRS 338.121(3).

10. Is the state a deferral state for charges filed with the EEOC?

Yes.

11. Are there any state laws related to compensation, including wage and hour, paid time off, mandatory breaks, fringe benefits, allowable deductions, prevailing wage rates for public contracts, etc.?

Yes. Kentucky's Wage and Hour Act (KRS Chapter 337) provides minimum requirements for employers toward their

employees. Some of these specific provisions include:

Overtime. Kentucky requires overtime pay rate for all employees on the seventh consecutive day of work during a specific work-week; however, this provision does not apply if the employee does not work more than 40 hours during this time period. KRS 337.050.

Timing of wage payment. Employers must pay their employees at least semi-monthly; the date of payment must be within 18 days of the final day of the pay period. KRS 337.020. If an employee quits or is terminated, all accrued-but-unpaid wages must be paid to them within 14 days of the date of termination or at the next applicable employer payday. KRS 337.055.

"Disciplinary" withholdings. It is unlawful for employers to withhold any portion of an employee's wage for a) fines; b) cash shortages where the cash deposit box (or cash register) is accessible to two or more employees; c) breakage; d) losses due to bad checks of third parties; e) losses due to defective or faulty workmanship, lost or stolen property, damage to property, default on customer credit, or non-payment for goods or services provided that none of the foregoing are due to an employee's willful or intentional misconduct. KRS 337.060.

Tip pooling. This practice is illegal in Kentucky unless it is voluntary. KRS 337.065.

Meal breaks; rest breaks. Employers must afford their employees a "reasonable period" for a meal while they are on duty; this period is generally accepted to be at least a half-hour. KRS 337.355. This break need not be paid. An employee cannot be required to take this break any earlier than 3 hours after the beginning of their shift, nor any later than 5 hours after the beginning of their shift. For every four hours worked, an employer is required to give the employee a paid, 10-minute "rest break." KRS 337.060.

Jury duty or required court attendance. Employers must permit their employees time off to attend lawful proceedings where duly summoned and provided that the employee give prior notice of the proceedings; termination of an employee for such attendance is illegal. KRS 337.415; KRS 29A.160.

In 2017, Kentucky's "prevailing wage requirement" for public contracts was repealed, effective immediately but not effective retroactively. It will become effective in July of 2017.

Violations of Kentucky's Wage and Hour Act (KRS Chapter 337) are punishable by fine. An aggrieved employee may also pursue a civil action for any unpaid wages as a result of an employer's violation of this chapter; employees may also recover an additional sum of "liquidated damages" equivalent to the unpaid wages. Attorneys' fees are recoverable by a prevailing plaintiff. KRS 337.385(1). Jury trial rights attach to these actions, but punitive damages are not recoverable.

12. Is there a state statute governing paid or unpaid leaves?

Kentucky law governing the allowance of leave relates to leave for the reception of an adoptive child up to a maximum of six weeks, provided that the child is under the age of 7. KRS 337.015. Kentucky employers also must grant leave as necessary for employees who are serving in the National Guard to perform required active duty or training. KRS 38.238. In both instances, employees may seek actual damages in civil lawsuits against their employers, plus attorneys' fees to the prevailing party and a jury trial.

13. Is there a state law governing drug-testing?

Some public-sector employees in Kentucky are subject to mandatory drug testing, such as school bus drivers (post-accident), law-enforcement officers (pre-employment, see KRS 15.380). Prevailing law in Kentucky is that even in a "suspicionless" random drug test, the Fourth Amendment's prohibition against unreasonable searches and seizures is not violated. Crager v. Board of Education of Knott County, Kentucky 313 F.Supp.2d 690 (E.D. Ky. 2004)

14. Is there a medical marijuana statute?

No medical marijuana law is on the books in Kentucky.

15. Is there trade secret / confidential information protection for employers?

Kentucky has adopted the Uniform Trade Secret Act, codified at KRS 365.880 et seq. The basic provisions of the UTSA prohibit the "misappropriation" of trade secrets, where the party using the trade secret has actual or constructive knowledge that it was improperly obtained or disclosed. "Improperly" can include theft, bribery, misrepresentation, or violation of an agreement with a former employer to keep such trade secrets confidential. The statutory scheme specifically allows for an injunction as a court-ordered remedy, in addition to other monetary damages.

16. Is there any law related to employee's privacy rights?

While invasion of privacy is a tort in Kentucky, the employee must demonstrate that he or she had a reasonable expectation of privacy in the context for which legal redress is sought. Provided that sufficient disclosure prior to or during employment is made to the employee about the non-privacy of things like e-mail, written and telephonic communications, no cause of action will exist. An employee's social media postings are not considered to be a private matter, particularly if no efforts are made by the employee to restrict public access. As a general rule of thumb, as long as the employer discloses to the employee that certain activities may be monitored, restricted or recorded, and the employee gives either express or implied consent, privacy-related torts cannot be pursued.

Wiretapping a telephone line is a crime in Kentucky. (KRS 526.010 et seq.) However, it is not a crime if the employee consents to it, and consent is an absolute defense. Electronic surveillance (video or photographic recording) of employees is permitted, but it must be conducted within the bounds of reason and there must be some sort of legitimate work-related purpose for the surveillance. See *Thomas v. General Electric Co*., 207 F.Supp. 792 (E.D. Ky. 1961). When done for an improper purpose, privacy-related torts may lie against the employer. See *Kroger Co. v. Willgruber*, 920 S.W.2d 61 (Ky. 1996).

17. Is there any law restricting arbitration in the employment context?

There is no separate law restricting a pre-employment agreement to arbitrate disputes. Like all other agreements to arbitrate, it must strictly comply with the Kentucky Arbitration Act (KRS Chapter 417), including sufficient provisions to find that the employee knowingly and willingly waived his/her rights to a jury trial.

18. Is there any law governing weapons in the employment context?

KRS 237.110(17) provides that an employer cannot prevent an employee from lawful possession of a firearm so long as it is kept in the employee's personal vehicle. However, the statute otherwise permits an employer to prohibit the carrying of concealed deadly weapons on the employer's business premises anywhere other than the employee's own vehicle.

19. Miscellaneous employment or labor laws not discussed above?

Non-compete provisions in employment agreements. Kentucky will generally uphold the validity of these clauses, but subject to the "blue-pencil" rule. That means that the restrictions on prospective employment after termination of the employer-employee relationship will be modified if the court finds them to be broader than necessary to protect the employee's interests, either with respect to time, geography or other conditions. See, generally, *Cent. Adjustment Bureau Inc. v. Ingram Associates, Inc*., 622 S.W.2d 681 (Ky. App. 1981). A careful distinction must be drawn, however, when an employer does not require an employee to sign a non-compete agreement prior to the commencement of employment, but does so in the midst of employment without any further consideration given (change in job status, benefits, salary, etc.). In those instances, courts may find that because there was no consideration given, the non-compete agreement is contractually invalid. Merely continued employment ("you can stay employed the same as before if you sign, but you're fired if you don't") is not sufficient consideration. See *Creech v. Brown,* 433 S.W.3d 345 (Ky. 2014).

LOUISIANA

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1. Is the state generally an employment-at-will state?

Yes, Louisiana is an employment-at-will state. La. Civ. Code art. 2747.

2. Are there any statutory exceptions to the employment-at-will doctrine?

Yes, Louisiana has numerous statutes that protect employees from being terminated based on a protected characteristic, in retaliation for invoking protected rights or whistleblower activities (23:967 & 30:2027), or for other conduct (e.g., garnishment (23:731), political activities (23:961, labor participation (23:964, smoking (23:966), jury duty (23:965), breastfeeding (51:2247.1), bone marrow donation (40:1299.124), school activities (23:1015), emergency response (23:1017.1)).

Other than these statutory exceptions, if a term of employment has been agreed upon by the parties in an employment agreement, then the employer may only fire the employee "upon serious ground of complaint." La. Civ. Code art. 2749. If the employer terminates the employee prior to the end of the term without just cause, then the employer will owe the employee wages for the full term of employment. *Id.* If it is the employee who terminates the employment prior to the end of the term, then the employee will have to repay the employer for any wages he received in advance and will have forfeited any remaining wages due under the term of employment.

3. Are there any public policy exceptions to the employment-at-will doctrine?

There are no public policy exceptions to the employment-at-will doctrine in Louisiana other than indicated in Question No. 2. "Aside from the federal and state statutory exceptions, there are no broad policy considerations creating exceptions to employment at will and affecting relations between employer and employee." *Quebedeaux v. Dow Chem. Co.*, 2001-2297 (La. 6/21/02, 5), 820 So.2d 542, 546 (internal quotes omitted).

4. Is there any law related to the hiring process?

Frequency of Payment

Employers must inform employees when they are hired the amount and frequency of payment for wages. If an employer does not designate a specific pay period, he must pay his employees on the 1st and 16th of every month, except that individuals employed in the following fields must be paid every two weeks: manufacturing; boring for oil and mining operations; and public service corporations. The bi-weekly payment schedule only applies to employers with 10 or more employees. La. Rev. Stat. 23:633.

Immigration:

It is prohibited to employ, hire, recruit, or refer for private or public employment any alien who is not entitled to lawfully reside or work in the United States. La. Rev. Stat. 23:992.

Violations can result in criminal penalties, which allow for fines that range from $500, regardless of the number of illegal aliens employed for the first violation, up to $2,000 per illegal alien employed for three or more violations. La. Rev. Stat. 23:993.

In addition to the criminal penalties, civil penalties include similar monetary fines ($500 to $2,500 per illegal alien employed), but also allow for the suspension of the violator's business license/permit by the Louisiana Workforce Commission for up to six months for three or more violations. La. Rev. Stat. 23:995.

Exceptions include hiring aliens for: The planting and harvesting of agricultural, forestry, or horticultural produces; the production and gathering of livestock, dairy, or poultry products; animal husbandry; and the care, feeding, and training of horses. La. Rev. Stat. 23:922.1.

Background/Medical Checks:

Certain employers are required to conduct background checks on their employees prior to hiring. These include:

Any non-licensed individuals or licensed ambulance personnel who provide nursing care, health-related services, medic services, or supportive assistance. La. Rev. Stat. 40:1203.2.

Certified Nurse Aid. La. Rev. Stat. 40:2120.57

Physical Therapists who are applying for a license. La. Rev. Stat. 37:2413.

Medication attendants. La. Rev. Stat. 37:1026.7.

Childcare providers. La. Rev. Stat. 17:407.71.

Any public or private school "teacher, substitute teacher, bus operator, substitute bus operator, or janitor, or as a temporary, part-time, or permanent school employee of any kind." La. Rev. Stat. 17:15.

La. Rev. Stat. 23:897 makes it unlawful for any public or private employer to require an employee or applicant to pay for the cost of fingerprinting, a medical examination, or a drug test. This includes passing the cost on to the employee through a paycheck withholding or other similar means.

Except for occupations which specifically require a background/criminal check, it is otherwise prohibited for a state employer to conduct a check until after an interview or conditional offer of employment. La. Rev. Stat. 42:1701.

All other hiring restrictions/regulations are discussed in the Section concerning discrimination.

5. Does the state recognize implied employment contracts under employment handbooks, policies, or practices?

Louisiana considers the employer-employee relationship as a contractual relationship, which is either for a limited term or terminable "at will." When a contract does not provide for a limited term, the default "at will" relationship exists. *Read v. Willwoods Cmty*., 2014-1475 (La. 3/17/15), 165 So.3d 883, 886–87 (citing *Quebedeaux v. Dow Chemical Co*., 01–2297 (La.6/21/02), 820 So.2d 542, 545); *see also* La. Civ. Code arts. 2746-2750.

An employment manual or handbook that governs other aspects of the employment relationship cannot alter the terms of employment established outside such a document. *Granger v. Christus Health Central Louisiana*, 144 So.3d 736, 762 n. 29 (La. 2013); *see also Square v. Hampton,* 2013-1680 (La.App. 4 Cir. 6/4/14, 16–17), 144 So.3d 88, 98–99 (personnel policies do not alter "at will" status or reflect contract of employment that creates an implied contractual right to continued employment); *Stanton v. Tulane University of Louisiana*, 00–0403, p. 16 (La. App. 4 Cir. 1/10/01), 777 So.2d 1242, 1250-52 (rejecting implied "covenant of good faith and fair dealing" exception to employment at will based on handbook); *Mix v. Univ. of New Orleans*, 609 So.2d 958, 963 (La. App. 4th Cir. 1992) (employment at will may be altered by contract, but not by internal policies, procedures, and manuals). While benefits delineated in the employment manual or handbook are governed by those provisions and not considered mere gratuities, they do not alter the nature of the relationship or convert an at-will relationship to employment for a limited term. *Granger v. Christus Health Central Louisiana*, 144 So.3d 736, 762 n. 29 (La. 2013) (citing *Wyatt v. Avoyelles Parish School Board*, 2001–3180 (La.12/4/02), 831 So.2d 906; *Beard v. Summit Institute of Pulmonary Medicine & Rehabilitation*, 97–1784 (La.3/4/98), 707 So.2d 1233; *Knecht v. Board of Trustees for State Colleges and Universities and Northwestern State University*, 591 So.2d 690, 694–95 (La.1991)).

6. Does the state have a right to work law or other labor / management laws?

Louisiana public policy guarantees all workers the right to form, join and assist labor organizations or to refrain from any such activities. La. Rev. Stat. 23:981. This policy encompasses the view that an employee cannot be forced to join a labor organization as a condition of employment, nor can an employee be forced to pay any dues to a labor organization. La. Rev. Stat. 23:983. Any agreements in violation of this stated policy are declared null and void. La. Rev. Stat. 23:984.

Likewise, an employment contract wherein an employee agrees to either join or not join a labor union or organization cannot be enforced. La. Rev. Stat. 23:823. Any employer who attempts to coerce its employees into joining a labor organization or to not join a labor organization is subject to fines and potential imprisonment for up to 30 days. La. Rev. Stat. 23:824.

7. What tort claims are recognized in the employment context?

Louisiana's Workers' Compensation Act generally governs an employer's liability to his employees. La. Rev. Stat. 23:1020 *et seq*. Because an employer is obligated to carry workers' compensation insurance coverage, the remedy provided to the employee for his injuries is the *exclusive* remedy available and the employer cannot be liable for any other damages of any kind. La. Rev. Stat. 23:1032. However, this immunity from further action will not apply in the case of intentional torts, in which case, any recovery the plaintiff is awarded through the tort action will be offset against recovery from workers' compensation. *Id.*

Another type of claim which is excluded from the worker's compensation immunity provided to employers is asbestos claims. For claims based on exposure to asbestos prior to 1975 (but post 1952 when Louisiana enacted its workers' compensation statute), the workers' compensation immunity only applied to cases involving specifically listed diseases and substances. Asbestos and mesothelioma, unlike asbestosis, were not listed. Therefore the employer immunity provided by La. Rev. Stat. 23:1031.1 pre-1975, applied to asbestosis claims, but did not apply to claims based on mesothelioma because neither mesothelioma, nor asbestos, which causes mesothelioma, were listed as covered diseases/substances. *Rando v. Anco Insulations Inc.*, 2008-1163 (La. 5/22/09), 16 So.3d 1065. The Louisiana legislature amended the workers' compensation statute in 1974 to remove the limitation that workers' compensation would only cover specifically listed illnesses. *Id.* As a result, mesothelioma and other lung cancers caused by exposure to asbestos are now covered under the workers' compensation immunity, but only for *exposure* that occurred post 1975.[1] Note that this does not prevent claimants from suing the executive officers of the employers and their insurers for knowingly exposing their employees to such toxic substances.

As for claims brought by non-employee third parties, Louisiana recognizes all traditional intentional and negligent torts against employers for the acts of their employees, including negligent hiring.

Under La. C.C. art. 2720, employers are responsible for any damage caused by their employees while acting in the course and scope of their employment. In order to succeed in bringing a case against an employer for the acts of his or her employee, the plaintiff must show that the employer was able to prevent the act which caused the damage and that the employer failed to take such action. *Id.* Under article 2720, an employer is responsible for the offenses committed by his employees according to the rules set out for general torts, or "quasi-offenses" as they are called in the Civil Code. In order for an employer to be liable for the acts of an employee, the plaintiff must establish three elements:

1. Employer/employee relationship
2. Employee was acting within the course and scope of his employment relationship
3. Actual fault on the part of the employee

Employers can be liable even for intentional torts by employees against other employees if the employee's intentional act is closely related to his employment. *LeBrane v. Lewis*, 292 So.2d 216 (La. 1974). Under *LeBrane*, there are four factors to consider in determining whether an employer can be liable for an employee's intentional act. They are:

1. whether the tortious act was employment rooted;
2. whether the violence was reasonably incidental to the performance of the employee's duties;
3. whether the act occurred on the employer's premises; and
4. whether the act occurred during the course hours of employment.

See also *Baumeister v. Plunkett*, 673 So.2d 994, 996 (La. 1996) (Employer not vicariously liable "merely because his employee commits an intentional tort on the business premises during working hours," but only when the tortious act is "so closely connected in time, place and causation to [the employee's] employment duties as to be regarded as a risk of harm fairly attributable to the employer.) Just being within the course of employment (on the employer's premises and during employment hours), without more, is not sufficient to hold the employer liable. *Stacy v. Minit Oil Change, Inc.*, 38,439 (La.App. 2 Cir. 5/12/04), 874 So.2d 384, 387. Rather, the predominant factor to find an employer liable is "whether the purpose of serving the employer's business actuated the employee to any appreciable extent." *Id.* (holding that an altercation between employees, although during the employment hours and on the employer's premises, was related to a disagreement over cookies and not related to the employer's objectives.

8. Is there a common law or statutory prohibition against discrimination / hostile work environment?

Louisiana has statutory protections against discrimination. Generally, employers who employ 20 or more employees for each working day in 20 or more calendar weeks during the current or preceding calendar year are subject to Louisiana's

anti-discrimination laws. La. Rev. Stat. 23:302.

La. Rev. Stat. 23:303 authorizes civil suits generally by employees against employers. Reasonable attorney fees and court costs are available. However, if the claim is found to be frivolous, the plaintiff can be held liable to the defendant employer for attorney fees and court costs. Additionally, in the case of discrimination suits, the employee must first give the employer 30 days advance notice of his intent to pursue the discrimination claim, detailing the claim. At that point, both parties must make a good faith effort to resolve the dispute prior to initiating court action.

Under section 303, all discrimination claims are subject to a 1 year prescriptive period (statute of limitations). This 1 year period can be suspended while a claim is being reviewed by the Equal Employment Opportunity Commission or the Louisiana Commission on Human Rights, but any such suspension cannot last longer than six months.

Specific examples of discrimination which are prohibited include:

Age (La. Rev. Stat. 23:312)

Applies to individuals over the age of 40.

Disability (La. Rev. Stat. 23:323)

Applies to individuals who have a mental or physical impairment which substantially limits a major life activity. The person must also be able to perform the duties of the job with or without reasonable accommodations. Reasonable accommodations means do not require the employer to provide the best accommodations or to impose undue hardship upon the employer or other employees

Veteran/military status (La. Rev. Stat. 23:331)

This prohibition does not apply to veterans who were dishonorably discharged. It requires employers to allow veteran employees leave to attend medical appointments necessary to receive veteran benefits.

Race, color, religion, sex, or national origin (La. Rev. Stat. 23:332)

Sickle Cell Trait (La. Rev. Stat. 23:352)

Genetic Information (La. Rev. Stat. 23:368)

Employers cannot gather, store or disclose genetic information from applicants unless it is to assess a medical condition which prevent the employee from performing the essential functions of the position.

Pregnancy/childbirth (La. Rev. Stat. 23:341–342)

The prohibition contained in section 342 only applies to employers who employ more than 25 employees for at least 20 weeks per calendar year. Further, leave for a “normal pregnancy” is only required for 6 weeks. La. Rev. Stat. 23:341. Leave for pregnancies which result in the mother being disabled, however, is extended to a maximum of 4 months. La. Rev. Stat. 23:342. Louisiana employers are not required to carry health insurance which covers pregnancy, childbirth or related medical conditions. La. Rev. Stat. 23:341.

9. Is there a common law or statutory prohibition of retaliation?

Age:

It is unlawful to retaliate against any employee who opposes a practice which discriminates based on age or assists or otherwise participates in an investigation into age discrimination. La. Rev. Stat. 23:312(D).

Sickle Cell Trait:

It is unlawful to retaliate against any employee who opposes a practice which discriminates based on the presence of the sickle cell trait or assists or otherwise participates in an investigation into discrimination based on the presence of the sickle cell trait. La. Rev. Stat. 23:352(D).

Military Service:

Employers are prohibited from taking any retaliatory action against any person because such person has asserted or supported a uniformed service member’s rights or has assisted or otherwise participated in an investigation into discrimination by an employer on the basis of an employee’s uniformed service status. La. Rev. Stat. 29:404.

Bone Marrow Donor Leave:

Employers may not retaliate against employees who seek paid leave to donate bone marrow. La. Rev. Stat. 40:1263.4.

In General:

Employers are prohibited from taking any reprisal action against an employee who objects to, discloses or threatens to disclose, or participates in the investigation of any practice that is in violation of state law. La. Rev. Stat. 23:967.

There is also a general prohibition against the conspiracy to retaliate or discriminate against any person because they opposed or assisted or participated in the investigation of any action declared discriminatory under Louisiana law. La. Rev. Stat. 51:2256.

Louisiana jurisprudence supports the position that retaliation for opposing *any* unlawful discrimination in the workplace is prohibited under Louisiana Employment Discrimination Law. *See Alleman v. La. Dept. of Economic Development*, 698 F. Supp. 2d 644, 663 (M.D. La. 2010).

10. Is the state a deferral state for charges filed with the EEOC?

Louisiana Commission on Human Rights (LCHR) is the state agency responsible for enforcing both state and federal discrimination laws. Under a "Memorandum of Understanding," the LCHR and the EEOC work in tandem with one another. While the LCHR allows Individuals claiming employment discrimination 180 days from the date of the alleged unlawful act to file suit, because Louisiana is a deferral state, individuals have 300 days from the date of the alleged unlawful act to file an EEOC complaint. Once a suit is filed with the LCHR, the LCHR will then have 30 days to determine whether probable cause exists to further pursue the discrimination claim. Filing a claim with the LCHR does not prevent the claimant from also pursuing the claim in state court pursuant to La. Rev. Stat. 23:303.

11. Are there any state laws related to compensation, including wage and hour, paid time off, mandatory breaks, fringe benefits, allowable deductions, prevailing wage rates for public contracts, etc.?

Minimum Wage and Benefits

Local subdivisions are not permitted to set mandatory minimum wage rates or vacation or sick days in variance with state policy, which follows the federal minimum wage. La. Rev. Stat. 23:642.

Wages upon Termination of Employment

Upon termination of employment, either by discharge or resignation, the employer must pay whatever amount is owed to the employee under the terms of the employment by the earlier of either the next regular payday or within 15 days after employment is terminated. This law can be altered by a collective bargaining agreement. Validly accrued vacation pay and any other fringe benefits owed by the employer pursuant to a collective bargaining agreement that have not already been otherwise compensated for are included in wages owed. If the employer disputes the amount owed to the employee, the employer must pay whatever amount is not in dispute by the deadline stated above. La. Rev. Stat. 23:631.

If an employer fails to comply with the above procedure, the employer will be liable to pay the employee an additional 90 days of wages, or full wages from the time of the demand until payment is made, whichever is less. If the employer disputes the amount of wages owed in good faith, but is still found to owe the amount claimed, the penalty shall be limited to judicial interest incurred from the date the suit was filed. Employees may bring suit to collect wages due in the district court where the work was performed. Attorneys' fees are allowed to the employee from the employer. La. Rev. Stat. 23:632.

Additionally, no employer may include a provision in any employment contract that requires the employee to forfeit wages upon early termination of the contract. In the event an employment contract is completed early, the employee will be entitled to wages actually earned at the time of termination. An exception to this rule allows employers to recoup medical exam / drug test costs if an employee resigns within 90 days of beginning employment unless the employee resigned because of a substantial change in employment caused by the employer or if the employee earns less than $1 more than the federal minimum wage. La. Rev. Stat. 23:634.

Fines against employees

Unless an employee willfully or negligently causes injury to the employer or his property or the employee is convicted or pleads guilty to theft of employer funds, no fines may be assessed against an employee or deduct any amount from any employee's wages. When fines are allowed for injury to the employer, the fines cannot exceed the actual damage done. La. Rev. Stat. 23:635.

Breastfeeding Mothers

Although Louisiana does not have a statute requiring employers to allow breastfeeding mothers a time and place to do so during employment hours, the right of a mother to breastfeed her child in "any place of public accommodation, resort, or amusement" is protected by statute. La. Rev. Stat. 51:2247.1(B).

12. Is there a state statute governing paid or unpaid leaves?

Maternity (See above discussion on discrimination based on pregnancy/childbirth)

Leave for a "normal pregnancy" is only required for 6 weeks. La. Rev. Stat. 23:341. Leave for pregnancies which result in the mother being disabled, however, is extended to a maximum of 4 months. La. Rev. Stat. 23:342. Louisiana employers are not required to carry health insurance which covers pregnancy, childbirth or related medical conditions. La. Rev. Stat. 23:341.

Jury Duty (La. Rev. Stat. 23:965)

Employers are required to grant any employee who is called for jury duty leave to attend, which leave cannot count towards sick or vacation leave. A violation of this results in a fine on the employer of not less than $100 and not more than $500 and reimbursement to the employee of wages due for that day.

An employee cannot be discharged or subject to any adverse employment action for attending jury duty. Any violation of this provision results in reinstatement of the employee with the same wages and benefits and a fine on the employer of not less than $100 or more than $1,000 for each employee discharged.

13. Is there a state law governing drug-testing?

Employers may conduct drug testing to test for marijuana, opiates, amphetamines, and phencyclidine. La. Rev. Stat. 49:1002. Testing for other drugs is allowed, but not regulated. All information obtained through drug testing must be kept confidential and cannot be used as evidence or disclosed in any proceedings, except for administrative and civil proceedings where the drug test results are relevant. La. Rev. Stat. 49:1012. An employee who tests positive is allowed to review his/her results within seven working days of testing positive. La. Rev. Stat. 49:1011.

Public employers are permitted to implement drug testing programs for public employees as a condition of employment, following an accident during the course and scope of employment or under other circumstances which result in a reasonable suspicion that drugs were used, in order to ensure compliance with a rehabilitation program, or to monitor employees who occupy safety-sensitive or security-sensitive positions. La. Rev. Stat. 49:1015.

Drug testing is also done in conjunction with Workers' Compensation and Unemployment Compensation. An employer may demand a drug or alcohol test following an on-the-job injury, when a positive test would preclude eligibility for workers compensation. La. Rev. Stat. 23:1081. An individual's unemployment benefits may also be withheld if the employee was fired due to a positive result from a properly administered drug test by the employer in accordance with a written and promulgated substance abuse rule or policy. La. Rev. Stat. 23:1601(10).

14. Is there a medical marijuana statute?

La. Rev. Stat. 40:1046

Louisiana licensed physicians who also reside in Louisiana are permitted to recommend and prescribe medical marijuana in a form permitted by the rules and regulations of the Louisiana Board of Pharmacy (excepting inhalation) for a "debilitating medical condition," which is defined as "cancer, positive status for human immunodeficiency virus, acquired immune deficiency syndrome, cachexia or wasting syndrome, seizure disorders, epilepsy, spasticity, Crohn's disease, muscular dystrophy, or multiple sclerosis."

15. Is there trade secret / confidential information protection for employers?

Louisiana Unfair Trade Practices Act

It is unlawful for anyone to develop or manufacture a produce, or to develop or supply a service using stolen or misappropriated property, including an employer's information. La. Rev. Stat. 51:1427.

Louisiana Uniform Trade Secrets Act

If a former employee misappropriates or threatens to misappropriate a trade secret from an employer, the employer may be entitled to injunctive relief (La. Rev. Stat. 51:1432), damages for the actual loss caused by the misappropriation, and unjust enrichment (La. Rev. Stat. 51:1433). Attorneys fees can be awarded if a party files or resists a claim of

misappropriation in bad faith or if the misappropriation was willful and malicious. La. Rev. Stat. 51:1434.

La. Rev. Stat. 23:921

Non-compete and non-solicitation agreements are enforceable in Louisiana to prevent a former employee from carrying on or engaging in a business similar to that of the employer and/or soliciting customers of the employer only up to a period of 2 years and only with respect to the parish(es) where the employer/former employer is actually conducting business. The parishes which are made subject to the non-compete agreement must be specified in the agreement.

While non-compete agreements are generally prohibited in Louisiana, confidentiality agreements are not considered the same as non-compete agreements and are, therefore, not prohibited under § 921. *NovelAire Technologies, L.L.C. v. Harrison*, 2009-1372 (La.App. 4 Cir. 10/13/10), 50 So.3d 913, 918–19.

Violation of any such agreement, in addition to injunctive relief, will permit the employer to recover damages for the loss sustained and the profit that he was deprived of. La. Rev. Stat. 23:921(H).

"Even in the absence of a specific agreement prohibiting certain methods of competition, ... unfair methods of competition are unlawful in Louisiana." *National Oil Serv. v. Brown*, 381 So.2d 1269, 1273 (La. App. 1980)(citing La.R.S. 51:1405). "This rule is based on the principle that unfair methods of competition are against public policy and the agency principle that an employee (agent) has a duty not to use or communicate information given to him in confidence in competition with or to the injury of the employer (principal) unless the information is a matter of general knowledge" *Huey T. Littleton v. McGuffee*, 497 So.2d 790 (Ct. App. La. 3rd Cir. 1986) (quotation omitted); see also NCH Corp. v. Broyles, 749 F.2d 247, 254 (5th Cir.1985) (recognizing duty not to disclose even in the absence of contract). What constitutes unfair and/or deceptive practices is not specifically defined, but is determined on a case by case basis. *Wyatt v. PO2, Inc*., 651 So.2d 359 (La. App. 2d 1995). Courts have made clear, however, that although employees can seek other work or prepare to compete before resignation, they may not use confidential information acquired from their previous employer. *SDT Industries, Inc. v. Leeper*, 793 So. 2d 327, 333 (La. App. 2d 2001); *Creative Risk Controls, Inc. v. Brechtel*, 847 So. 2d 20 (La. App. 5th 2003).

Louisiana also recognizes a fiduciary duty claim based on breach of confidence. *Defcon, Inc. v. Webb*, 687 So.2d 639, 643 (La. Ct. App. 2d Cir. 1997), outlined the elements of a fiduciary duty claim premised on a breach of confidence: (1) possession by plaintiff of information that is not generally known; (2) communication of this information by the plaintiff to the defendant under an express or implied agreement limiting its use or disclosure by the defendant; and (3) use or disclosure by the defendant of the information in violation of the confidence to the injury of the plaintiff. *Id.* at 642-43 (citing *Engineered Mech. Svcs., Inc. v. Langlois*, 464 So.2d 619 (La. App.2d Cir. 1989)).

16. Is there any law related to employee's privacy rights?

The Louisiana Constitution recognizes the right to privacy: "Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy..." Article I, Section 5 of the Louisiana Constitution of 1974. This right includes the right to be free from unwarranted intrusion in one's own quarters, and protects against private as well as governmental conduct. See St. Julien v. South Central Bell Telephone Co., 433 So. 2d 837 (La. Ct. App. 3d Cir. 1983).

La. Rev. Stat. 23:291

Employers may disclose employment related information about its current of former employees upon request from a prospective employer or a current or former employee and provided that the employer is not acting in bad faith, meaning the information disclosed cannot be knowingly false or deliberately misleading. So long as the employer is not in bad faith, the employer will be immune from civil liability for such disclosure.

Similarly, a prospective employer who reasonably relies upon employment information supplied by a former employer will also be immune from civil liability related to the hiring of an employee.

Social Media

As of 2014, Employers in Louisiana are prohibited from requesting an employee's passwords to any social media accounts. La. Rev. Stat. 51:1953.

17. Is there any law restricting arbitration in the employment context?

La. Rev. Stat. 9:421

The Louisiana Arbitration Law does not apply to contracts of employment of labor which are controlled by valid legislation

of the United States. Louisiana has no express restriction on arbitration in the employment context. Therefore, the only restriction would be found in the Federal Arbitration Act, which states that it does not apply to contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce.

18. Is there any law governing weapons in the employment context?

La. Rev. Stat. 32:292.1

Employers may prohibit employees from carrying firearms in employer owned vehicles and from leaving firearms in automobiles parked in employer owned parking lots and/or garages, provided that any parking lot/garage is restricted from public use and the employer provides other means of storing unloaded firearms.

19. Miscellaneous employment or labor laws not discussed above?

Loans to Employees

Employers are permitted to loan money to employees, but never at an interest rate which exceeds 8%. Fines for exceeding that interest rate can range from $25 to $100 or imprisonment for up to 3 months.

Employment of Minors

Except as apprentices under special regulations, no minor is permitted to work in certain industries which create a hazard to the health and well-being of the minor (See La. Rev. Stat. 23:161 for a detailed list). All minors are required to have at least one thirty minute break every five hours for a meal and such break must be documented. La. Rev. Stat. 23:213.

Minors 12 and 13:

Generally speaking, no minor under the age of 14 is permitted to be employed unless the minor is at least 12, the parent or guardian is an owner or partner of the employer and directly supervises the minor, and the minor obtains an employment certificate allowing him or her to work. La. Rev. Stat. 23:162. Any minor working under the above conditions is afforded all the same rights as those afforded minors who are 14 and 15 years old. *Id.*

Minors 14 and 15:

Minors under 16 may not be employed in connection with any poolroom, power-driven machinery, manufacturing or processing plant, establishment where alcohol is served, or in the delivery of goods or messages. La. Rev. Stat. 23:163. Such minors may also not work in any profession that requires a higher minimum wage or during school hours. *Id.*; La. Rev. Stat. 23:166. Minors under 16 may only work a maximum of 8 hours a day and no more than 6 days a week (La. Rev. Stat. 23:211), except when school is in session during which period, no minor may work longer than 3 hours a day or 18 hours in a week (La. Rev. Stat. 23:214). In addition to the above time restrictions, minors under 16 who have not graduated from high school may not work between the hours of 7:00 pm and 7:00 am except during the summer, during which time the permissible working day is extended to 9:00 pm, with a maximum number of hours set at 40 hours a week. La. Rev. Stat. 23:215.

16-year-olds who have not graduated from high school may not work between 11:00 pm and 5:00 am prior to any school day. La. Rev. Stat. 23:215.

17-year-olds who have not graduated from high school may not work between 12:00 pm and 5:00 am prior to any school day. La. Rev. Stat. 23:215.

Employees' Right to Access Employer Records

Louisiana employees have the right to access their current or former employer's records of exposure to potentially toxic materials or harmful agents as well as employee medical records and analyses using any of the above records. Employees are entitled to bring suit to enforce this right if the employer does not comply with any such request. La. Rev. Stat. 23:1016.

Louisiana Smokefree Air Act

Among other places, Louisiana prohibits smoking in any enclosed area within a place of employment and any employer who knowingly permits smoking in such an area is in violation of the statute. La. Rev. Stat. 40:1291.11(A).

While the statute permits smoking in outdoor areas of places of employment, if the owner or manager of the business posts signs prohibiting smoking in the outdoor areas, then the outdoor areas will be considered smoke-free areas under the statute. La. Rev. Stat. 40:1291.11(B)(6).

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MARYLAND

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1. Is the state generally an employment-at-will state?

Subject to certain exceptions (addressed below), Maryland generally is an employment-at-will state and all employment relationships in Maryland are presumed to be at-will. Thus, in the absence of an express contract, agreement, or policy to the contrary, an employee may hired or fired for any reason – whether fair or not – or for no reason at all.

2. Are there any statutory exceptions to the employment-at-will doctrine?

Yes, as discussed in the applicable sections below. (For example, whistleblower laws and non-discrimination and non-retaliation laws).

3. Are there any public policy exceptions to the employment-at-will doctrine?

Maryland courts have recognized, as a judicial exception to the at-will employment doctrine, the tort of "abusive discharge" (frequently referred to as "wrongful discharge"). *Adler v. American Standard Corp.*, 291 Md. 31 (1981) (recognizing tort of abusive discharge). In order to establish a claim for wrongful discharge, an employee must show that: (1) s/he was discharged; (2) the discharged violated a clear mandate of public policy; and (3) there was a nexus between the employee's conduct and the employer's decision to terminate the employee. Maryland courts generally recognize a violation of a clear mandate of public policy to have occurred when an employee is discharged either after refusing to commit an act that is illegal under Maryland law or after fulfilling a duty required by Maryland statute. A claim for wrongful discharge is precluded, however, if a civil remedy exists.

4. Is there any law related to the hiring process?

Note that various counties and municipalities in Maryland have enacted additional laws related to the hiring process (e.g., Ban the Box laws). You always should consult with a Maryland labor and employment attorney prior to opening a business in Maryland and/or employing Maryland citizens.

Advertising—As discussed in more depth in the sections below addressing anti-discrimination laws, an employer with 15 or more employees (as well as a labor organization and/or employment agency) must comply with Maryland's antidiscrimination provisions as they relate to notices or advertisements of employment and may not discriminate in hiring. The same is true regarding notices or advertisements of internship opportunities and selection of interns.

Applications—Maryland imposes few requirements and/or prohibitions regarding content of employment applications. Maryland law (Md. Code. Ann., Labor & Employment § 3-702(d)) requires every application for employment to include the following notice in bold-faced upper case type:

"Under Maryland law, an employer may not require or demand, as a condition of employment, prospective employment, or continued employment, that an individual submit to or take a polygraph examination or similar test. An employer who violates this law is guilty of a misdemeanor and subject to a fine not exceeding $100."

The application must also provide a space for the applicant to sign an acknowledgment of this notice. There is no private right of action for violation of this statute. Only the Commissioner of Labor and Industry or the Attorney General have enforcement powers.

Maryland law (Md. Code. Ann., Labor & Employment § 3-704(f)) also prohibits a retail-establishment employer from requiring an applicant for employment who seeks a workweek of at least 25 hours to answer any question to identify the applicant's

chosen day of rest. Maryland law.

Credit History—The Maryland Job Applicant Fairness Act (Md. Code Ann., Labor & Employment § 3-711) prohibits an employer from requesting or using an applicant's or employee's credit report or credit history to deny employment to the applicant, to discharge the employee, or to determine compensation or the terms, conditions, and privileges of employment. An employer, however, may request or use an applicant's or employee's credit report or credit history if: (1) the applicant has received an offer of employment and the credit report or credit history will be used for a purpose other than those that are prohibited, or (2) the employer has a bona fide purpose for requesting or using information in the credit report or credit history that is substantially job-related and disclosed in writing to the employee or applicant. By statute, positions that satisfy the "bona fide purpose" requirement include those that: are managerial and involve setting the direction or control of a business (or a department, division, unit, or agency of a business); involve access to personal information of a customer, employee, or employer (except for personal information customarily provided in a retail transaction); involve a fiduciary responsibility to the employer, including the authority to issue payments, collect debts, transfer money, or enter into contracts; are provided an expense account or a corporate debit or credit card; or have access to the trade secrets or other confidential business information. There is no private right of action for violation of this statute, though an aggrieved applicant or employee may file a written complaint with the Commissioner of Labor and Industry. The Commissioner will then investigate the matter and try to resolve the matter informally and, if unsuccessful, assess a civil penalty.

The Job Applicant Fairness Act does not apply to the following employers:

- Any employer that is legally required (either under federal law or State law) to inquire into an applicant's or employee's credit report or credit history;
- A financial institution (or its affiliates or subsidiaries) that accepts deposits insured by a federal agency;
- A credit union share guaranty corporation that is approved by the Maryland Commissioner of Financial Regulation; or
- Any entity (or affiliate thereof) that is registered as an investment advisor with the SEC.

The Act also may not be construed to prohibit an employer from performing an employment-related background investigation that includes the use of a consumer report or investigative consumer report, as authorized under the federal Fair Credit Reporting Act, and does not involve investigation of credit information.

Expunged Criminal Records—Maryland law (Md. Code Ann., Criminal Procedure § 10-109) prohibits an employer from requiring an applicant for employment to disclose expunged criminal charges. Additionally, the law provides that applicants for employment need not disclose expunged charges when answering a question regarding charges that did not result in a conviction or a conviction that the Governor pardoned.

Hiring Preferences—Maryland law (Md. Code. Ann., Labor & Employment § 3-714) allows an employer to grant a preference in hiring (and promotion) to a veteran of any branch of the U.S. Armed Forces who has received an honorable discharge or a certificate of satisfactory completion of military service, including the National Guard and the military reserves. Maryland law also allows an employer to grant a preference in hiring (and promotion) to the spouse of any such veteran who has a service-connected disability or the surviving spouse of any such veteran.

Medical History—Maryland law (Md. Code. Ann., Labor & Employment § 3-701) prohibits an employer from requiring an applicant for employment to answer any questions – both oral and written – that relate to a physical, psychiatric, or psychological disability, illness, handicap, or treatment unless the disability, illness, handicap, or treatment has a direct, material, and timely relationship to the capacity or fitness of the applicant to perform the job properly. However, an employer is not prohibited from requiring a proper medical evaluation by a physician to assess the ability of an applicant to perform a job. An aggrieved applicant may file a written complaint with the Commissioner of Labor and Industry or bring a civil action for injunctive relief, damages, or other relief.

Personal User Name and Password—Maryland law (Md. Code. Ann., Labor & Employment § 3-712) prohibits an employer – including a unit of State or local government – from requesting or requiring that an applicant or employee disclose any user name, password, or other means for accessing a personal account or service through an electronic communications device, including but not necessarily limited to computers, telephones, and personal digital assistants. The law also prohibits an employer from failing or refusing to hire an applicant (or discharging, disciplining, or otherwise penalizing – or threatening to do so – an employee for refusing to disclose a personal user name or password). There does not appear to be a private right of action for violation of this statute, though an aggrieved applicant or employee may file a written complaint with the Commissioner of Labor and Industry, who will try to resolve the matter informally or ask the Attorney General to bring an action on behalf of the applicant or employee.

Note that an employer may require an employee to disclose any user name, password, or other means for accessing

nonpersonal accounts or services that provide access to the employer's internal computer or information systems.

Polygraph Tests—Subject to certain exceptions, Maryland law (Md. Code. Ann., Labor & Employment § 3-702) prohibits anemployer – including the State, a county, or a municipal corporation in the State – from requiring or demanding, as a condition of employment, prospective employment, and/or continued employment, that an applicant, prospective employee, or current employee submit to or take a polygraph or similar test. As noted above, only the Commissioner of Labor and Industry or the Attorney General have enforcement powers. This prohibition does not apply to the following:

The federal government or any of its units;

Individuals employed in or applying for assignment to the Intelligence and Investigative Division of the Department of Public Safety and Correctional Services;

Individuals applying for employment or employed as a "law enforcement officer" (as defined by § 3-101 of the Public Safety Article);

Individuals applying for employment with or employed by a law enforcement agency of the State, a county, or a municipal corporation;

Individuals applying for employment as or employed as a communications officer of the Calvert County Control Center;

Individuals applying for employment with the Washington County Emergency Communications Center;

Individuals applying for employment as or employed as a correctional officer of a State correctional facility, county correctional facility, or local correctional facility;

Individuals applying for employment or employed in any capacity that involves direct contact with an inmate in a State correctional facility;

Individuals applying for employment as or employed as a correctional officer of the Calvert County Detention Center or the Washington County Detention Center, or in any other capacity that involves direct personal contact with an inmate in the Detention Center;

Individuals applying for employment as or employed as a correctional officer of the Baltimore County Detention Center, the Cecil County Detention Center, the Charles County Detention Center, the Frederick County Adult Detention Center, the Harford County Detention Center, or the St. Mary's County Detention Center; or

Individuals applying for employment with the Anne Arundel County Department of Detention Facilities or the Caroline County Department of Corrections in any capacity that involves direct contact with an inmate.

5. Does the state recognize implied employment contracts under employment handbooks, policies, or practices?

Maryland courts recognize a limited exception to the doctrine of employment at-will where certain personnel policies/practices or statements in employee handbooks may create implied contractual obligations. The exception applies to policies that limit the employer's discretion to terminate an indefinite employment or that establish procedures for termination. To create a contractual obligation, however, the policy language must be more than merely a general statement and instead must promise a specific and defined benefit. Additionally, the employee must have had knowledge of the policy when s/he began working or continued to work for the employer.

Where a personnel policy becomes a contractual obligation, an employer is bound only to follow the policy. No rights beyond those created by the policy are created or implied. If an employer violates its own policy, however, the employer may face a breach of contract claim. An employer that wishes to avoid the possibility of implied contractual obligations may use disclaimers to negate policy statements that might otherwise appear to limit the employer's ability to terminate employment at-will. To be effective, any disclaimer must be clear, conspicuous, and distributed widely.

6. Does the state have a right to work law or other labor / management laws?

Maryland has not enacted a "right to work" law.

7. What tort claims are recognized in the employment context?

Abusive or Wrongful Discharge—See Section 1 above.

Defamation—Under Maryland law, a defamatory statement is one that tends to expose a person to "public scorn, hatred, contempt, or ridicule, which, as a consequence, discourages others in the community from having a good opinion of, or

associating with, that person. Maryland also still has an archaic law providing that "[a]ny word spoken falsely and maliciously and likely to injure a woman's character or reputation for chastity is slander." Md. Code Ann., Courts & Judicial Proceedings § 3-501. A defamatory statement must be "published," which can occur through actions and/or gestures as well as by written and/or spoken word. Unless a conditional privilege applies, a plaintiff need only show that the defendant was negligent in publishing the defamatory statement. In the employment context, defamation claims are most likely to arise in the following two contexts: (1) an employer treats an employee as untrustworthy in front of others, or (2) when there is contact between a former employer and a prospective new employer.

Invasion of Privacy—Maryland recognizes four types of invasion of privacy: (1) an unreasonable intrusion upon the seclusion of another; (2) appropriation of the name or likeness of another; (3) unreasonable publicity given to the private life of another; and (4) publicity which unreasonably places another in a false light before the public. *Allen v. Bethlehem Steel Corp.*, 76 Md. App. 642 (1988). Depending on the factual circumstances, an employee could potentially assert a claim for invasion of privacy under one or more of these causes of action on the basis of: the employer's unlawful surveillance or wiretapping; the employer accessing the employee's stored communications not on the employer's server; the employer opening the employee's personal mail; the employer's improper procurement or use of a consumer report regarding an employee; the employer's improper inquiry into, use, or publication or an employee's medical information; or myriad other scenarios.

Intentional Infliction of Emotional Distress—Maryland recognizes the tort of intentional infliction of emotional distress (IIED) (without any accompanying physical injury). *Harris v. Jones*, 281 Md. 560 (1977). To prevail on an IIED claim, an employee has to prove (1) that the employer engaged in conduct that is intentional or reckless, (2) extreme and outrageous, (3) causally connected to the employee's emotional distress, and (4) that the employee's emotional distress is severe. It is not easy to satisfy the "extreme and outrageous conduct" requirement, however, because the conduct in question must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable to a civilized community.

Deliberate Intent to Injure or Kill—Maryland's workers' compensation statutes do not protect an employer from civil liability when the employer deliberately intends to injure or kill an employee. This exception to the workers' compensation laws is narrowly construed in favor of the exclusivity of workers' compensation. *See Johnson v. Mountaire Farms of Delmarva, Inc.*, 305 Md. 246 (1986). Thus, the deliberate intent exception requires proof of the employer's actual intent to injure or kill. Proof of wanton, willful, or reckless conduct, even if undertaken with the knowledge and appreciation of a high degree of risk to another, is not sufficient.

8. Is there a common law or statutory prohibition against discrimination / hostile work environment?

Subject to certain enumerated exceptions and/or exemptions, Maryland's Fair Employment Practices Act (Md. Code Ann., State Government § 20-601 *et seq.*) prohibits employment discrimination based on race, color, religion, ancestry or national origin, sex, age, marital status, sexual orientation, gender identity, genetic information, and/or disability. Accordingly, it is unlawful for an employer with 15 or more employees to fail or refuse to hire, discharge, or discriminate against with respect to compensation, terms, conditions, or privileges of employment an individual otherwise qualified because of that individual's protected status or because such individual refuses to submit to or make available the results of a genetic test. Md. Code Ann., State Government § 20-606(a)(1). It is unlawful for such an employer to limit, segregate, or classify its employees or applicants for employment in any way that would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect his/her status as an employee because of that individual's protected status or because such individual refuses to submit to or make available the results of a genetic test. Md. Code Ann., State Government § 20-606(a)(2). It also is unlawful for such an employer to request or require genetic tests or information as a condition of hiring or determining benefits. Md. Code Ann., State Government § 20-606(a)(3). And it is unlawful for such an employer to fail or refuse to make a reasonable accommodation for the known disability of an otherwise qualified employee. Md. Code Ann., State Government § 20-606(a)(4). Employment agencies and labor organizations are similarly prohibited from discriminating on these bases. Md. Code Ann., State Government § 20-606(b), (c), (f).

Maryland's employment discrimination laws apply equally to the State. But, with the exception of labor organizations, Maryland's employment discrimination laws do not apply to any bona fide private membership club that is exempt from taxation under Internal Revenue Code 501(c). The employment discrimination laws also do not apply to a religious corporation, association, educational institution, or society with respect to employment of individuals of a particular religion, sexual orientation, or gender identity to perform work connected with the activities of the religious entity. Md. Code Ann., State Government § 20-604. And the laws do not prohibit schools, colleges, universities, or other educational institutions from hiring and employing individuals of a particular religion where the institution's curriculum is directed toward the propagation of a particular religion or the institution is wholly or substantially owned, supported, controlled, or managed by a particular religion or religious corporation, association, or society. Md. Code Ann., State Government § 20-605(a)(3).

Remedies

Maryland law (Md. Code Ann., State Government § 20-1004) permits an aggrieved employee or applicant for employment tofile a complaint with the Maryland Commission on Civil Rights (MCCR). The complaint must be signed under oath and must be filed within 6 months after the date on which the alleged discriminatory act occurred. The complaint will then be investigated by the MCCR, which will issue written findings and, if there is a finding of probable cause, the MCCR will attempt conciliation of the matter. Maryland law (Md. Code Ann., State Government § 20-1013) also permits a complainant who timely filed an administrative charge or complaint under federal, state, or local law to bring a civil action against the employer alleging unlawful employment practices as long as at least 180 days have elapsed since the filing of the administrative charge or complaint and the civil action is filed within 2 years after the alleged unlawful employment practice occurred. The complainant can seek injunctive relief, affirmative relief (including the reinstatement or hiring of employees) with or without back pay, compensatory damages in specified amounts, other appropriate equitable relief, and punitive damages for actual malice (as long as the employer is not a governmental unit or political subdivision). Md. Code Ann., State Government §§ 20-1013, 10-1009. The filing of such a civil action automatically terminates any ongoing proceeding before the MCCR. Finally, the court may award the prevailing party reasonable attorneys' fees, expert witness fees, and costs. Md. Code Ann., State Government § 20-1015.

Internships

In 2015, the Maryland legislature enacted a new statute that extends the same rights to be free from employment discrimination to interns, internships, and applicants for such non-employment positions and programs. *See* Md. Code Ann. State Government § 20-610. This statute also creates non-discrimination requirements with regard to notices or advertisements regarding internship opportunities. *See* Md. Code Ann. State Government § 20-610(c). The remedies available to interns and applicants for such non-employment positions, however, are limited. There is no civil cause of action and monetary damages are unavailable. Instead, an aggrieved intern or applicant must have access to the employer's internal procedure(s) for resolving employee complaints of sexual harassment or other discrimination or, if the employer has no such internal procedure(s), an aggrieved intern or applicant may file a complaint with the Commission for only the nonmonetary administrative remedies provided in Subtitle 10 of the Human Relations Title. Md. Code Ann. State Government § 20-610(d).

9. Is there a common law or statutory prohibition of retaliation?

It also is unlawful in Maryland for employers covered by the employment discrimination statutes, employment agencies, and/or labor organizations to discriminate or retaliate against an employee or applicant for employment, an individual, or a member or applicant for membership because the individual has opposed a discriminatory practice or because the individual has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the employment discrimination statutes. Md. Code Ann., State Government § 20-606(f). The rights, remedies, and damages are the same as for employment discrimination as discussed in Section 8 above.

Maryland law also prohibits retaliation in a multitude of other contexts including, but not limited to, the following:

Workers' Compensation Claims—Md. Code Ann., Labor & Employment § 9-1105

Certain Volunteer Activities—Md. Code Ann., Labor & Employment § 3-703

Family Leave—Md. Code Ann., Labor & Employment § 3-802

Parental Leave—Md. Code Ann., Labor & Employment § 3-1209

Civil Air Patrol Leave—Md. Code Ann., Labor & Employment § 3-1006

Safety Complaints—Md. Code Ann., Labor & Employment § 5-604

Jury Service—Md. Code Ann., Courts & Judicial Proceedings § 8-501

10. Is the state a deferral state for charges filed with the EEOC?

Yes, and the EEOC and Maryland's state and local fair employment practices agencies have a work-sharing agreement such that a charge filed with either the EEOC or the FEPA generally is dual filed by whichever agency initially receives the charge.

11. Are there any state laws related to compensation, including paid time off, fringe benefits, prevailing wage rates for public contracts, etc.?

Note that various counties and municipalities in Maryland have enacted or are in the process of enacting wage and hour laws that impose requirements greater than those imposed by State law. You always should consult with a Maryland labor and employment attorney prior to opening a business in Maryland and/or employing Maryland citizens.

The starting point for Maryland's compensation laws is the Labor and Employment Title of the Maryland Code, which includes (but is not limited to) the following:

Wage and Hour—Subject to certain exceptions, the Maryland Wage and Hour Law (MWHL) (Md. Code Ann., Labor and Employment § 3-401 *et seq.*) requires employers to pay covered employees at least the greater of the federal minimum wage or the State minimum wage. As of July 1, 2017, the current State minimum wage is $9.25 per hour, up from $8.75 per hour, and on July 1, 2018, the State minimum wage will increase to $10.10 per hour. The MWHL – like the FLSA – requires that covered, non-exempt employees be paid at a rate of not less than 1.5 times each employee's regular rate of pay for all hours worked over 40 in a workweek.

For tipped employees, or those who regularly receive $30 or more each month in tips, employers are permitted to pay those employees $3.63 per hour and claim a "tip credit" for the rest of the minimum wage, as long as the employee is informed about the Maryland laws concerning tip credits and is allowed to keep all the tips received (which does not preclude tip pooling). However, employers are prohibited from requiring a tipped employee to reimburse or pay the employer for unpaid customer food or beverage charges (i.e., if the customer leaves the employer's place of business without paying the bill for food or beverages) or deduct the amount from the employee's wages.Md. Code Ann., Labor and Employment § 3-713.

An aggrieved employee may bring suit either individually or on behalf of a class of individuals for back pay and an equal amount in liquidated damages, plus attorneys' fees and court costs. Note that Montgomery and Prince George's Counties have different minimum wage and/or tip credit requirements.

Equal Pay—The Maryland Equal Pay for Equal Work Act (MEPA) (Md. Code Ann., Labor and Employment § 3-301 *et seq.*) requires employers to pay men and women in the same establishment equal pay for equal or comparable work. MEPA allows an aggrieved employee to file claims with the local agencies or to bring an action in state or federal court against the employer both on behalf of him/herself and on behalf of other employees similarly affected. Alternately, an aggrieved employee can request that the Commissioner of Labor and Industry bring an action on the employee's behalf.

Wage Payment—The Maryland Wage Payment and Collection Law (MWPCL) (Md. Code Ann., Labor and Employment § 3-501 *et seq.*) requires employers to pay each employee all wages s/he is due for the work performed at least once every 2 weeks or twice per month and also, in the case of termination of employment, on or before the day on which the employee would have been paid the wages had employment not been terminated. Additionally, employers are prohibited from making any deduction from the wage of any employee unless the deduction was (1) ordered by a court, (2) expressly authorized in writing by the employee, (3) allowed by the Commissioner of Labor and Industry because the employee received full consideration for the deduction, or (4) made in accordance with a law, rule, or regulation issued by a governmental unit. Once 2 weeks has passed after the date on which payment was required, an aggrieved employee may bring suit to recover any unpaid wages and, if the factfinder determines the employer violated the MWPCL and withheld the wage not as a result of a bona fide dispute, it has the discretion to award an amount up to but not exceeding three times the wages due, plus reasonable attorneys' fees and costs. An employee has a separate cause of action for each paycheck that does not reflect the wages that are due to him/her.

Mandatory Rest Periods—Maryland's Healthy Retail Employee Act (Md. Code Ann., Labor and Employment § 3-710) requires only that certain retailers with 50 or more retail employees provide some retail employees with breaks. Specifically, an employer must provide a 15-minute rest break to those working 4-6 hours and a 30-minute rest break to those working 6 or more hours. The law provides for more breaks to those employees who work more than 8 hours on a shift. The law also provides for exceptions and exemptions.

Laws relating to public contracts can be found in the State Finance and Procurement Title of the Maryland Code.

12. Is there a state statute governing paid or unpaid leaves?

Note that various counties and municipalities in Maryland have enacted additional leave laws (e.g., the Montgomery County Earned Sick and Safe Leave Law). It is advisable to consult with a Maryland labor and employment attorney prior to opening a business in Maryland and/or employing Maryland citizens.

Parental Leave—The Maryland Parental Leave Act (Md. Code Ann., Labor & Employment § 3-1201 *et seq.*) permits employees who work for an employer that has at least 15 but no more than 49 employees to request up to 6 weeks of unpaid leave for any 12-month period for the birth of that employee's child or the placement with that employee of a child for adoption or foster care. Much like the federal Family & Medical Leave Act, an employee is only eligible for MPLA leave is s/he has been employed with the employer for at least 12 months and accumulated at least 1,250 work hours during the previous 12 months. However, the MPLA permits an employer to deny unpaid parental leave if (1) the denial is necessary to prevent substantial and

grievous economic injury to the operations of the employer, and (2) the employer notifies the employee of the denial before the employee begins taking the leave. The MPLA creates a private right of action for employees affected by an employer's violation of the statute and permits employees to recover monetary damages equal to the amount of any wages, salary, employment benefits, or other compensation denied or lost as well as reasonable attorneys' fees and costs.

Flexible Family Leave—The Maryland Flexible Leave Act (Md. Code Ann., Labor & Employment § 3-802) allows employees who work for an employer that has 15 or more employees to use earned or accrued leave with pay –including sick leave, vacation time, and compensatory time – to take care of any member of that employee's immediate family who is ill. Immediate family is defined to include a child, spouse, or parent.

Adoption Leave—The Maryland Adoption Leave Act (Md. Code Ann., Labor & Employment § 3-801) requires employers who provide paid leave to an employee after the birth of the employee's child to also provide the same paid leave to an employee when a child is placed with the employee for adoption.

Civil Air Patrol Leave—Maryland's Civil Air Patrol leave laws (Md. Code Ann., Labor & Employment § 3-1001 *et seq.*) require all employers with 15 or more employees to provide no fewer than 15 days per calendar year of unpaid Civil Air Patrol leave to an employee responding to an emergency mission of the Maryland Wing of the Civil Air Patrol. Employers are also prohibited from interfering with the use of Civil Air Patrol leave allowed under the law and prohibits discrimination and retaliation against an employee who complies with the requirements of the law or opposes a practice not in compliance with the law. Additionally, employers are prohibited from (1) discriminating against or terminating an employee who has been employed for at least 90 days and is a member of the Civil Air Patrol because of that employee's membership in the Civil Air Patrol or (2) hindering or preventing any such employee from performing his/her service as part of the Maryland Wing of the Civil Air Patrol during an emergency mission of the employee is entitled to leave under the Civil Air Patrol leave laws. The Civil Air Patrol leave laws create a private right of action in employees to enforce their provisions and explicitly permit courts to enjoin an act or practice that violates the Civil Air Patrol leave laws and also to order equitable relief to redress the violation or to enforce the these laws.

Voting Leave—Maryland law (Md. Code Ann., Election Law § 10-315) gives all Maryland employees the right to take time off work to vote. Specifically, employees who do not have at least two consecutive hours off work while the polls are open must be allowed to take up to two hours off work with pay to vote.

Jury Duty Leave—Maryland law (Md. Code Ann., Courts & Judicial Proceedings § 8-501) gives employees the right to take time off work to answer a Maryland state court jury summons and/or serve on a jury. Additionally, an employee who spends at last four hours (including travel time to and from court) answering a jury summons or serving on a jury cannot be required to work a shift that begins on or after 5 p.m. that day or before 3 a.m. the following day. While Maryland does not require employers to pay employees for jury duty leave, Maryland law (Md. Code Ann., Courts & Judicial Proceedings § 8-502) prohibits employers from requiring employees to use their sick leave, vacation time, or paid time off for this purpose.

Deployment Leave—Maryland's Deployment leave law (Md. Code Ann., Labor & Employment § 3-803) permits employees who work for the State, counties in the State, municipal governments in the State, or an employer that has 50 or more employees, to take unpaid leave on the day that an immediate family member is leaving for or returning from active duty outside the U.S. as a member of the U.S. Armed Forces. An employee is only eligible for Deployment leave if s/he has been employed with that employer for at least 12 months and accumulated at least 1,250 work hours during the previous 12 months. For the purposes of Deployment leave, immediate family members include a spouse, parent, stepparent, child, stepchild, or sibling. Employers are prohibited from requiring an employee to use compensatory time, sick leave, or vacation time for Deployment leave.

13. Is there a state law governing drug-testing?

Maryland employers are permitted to conduct job-related drug and/or alcohol testing of employees and applicants for employment, but Maryland law (Md. Code Ann., Health – General § 17-214) requires the employer to use a laboratory that holds a State permit (if located within Maryland) or that meets specified requirements (if located outside of Maryland). At the time of testing, if the person being tested requests it, the employer must inform him/her of the name and address of the laboratory that will do the testing. If an employee or applicant tests positive, the employer is required to provide him/her with (1) a copy of the laboratory report indicating the test results, (2) a copy of the employer's written drug and/or alcohol policy, (3) written notice of the employer's intent to take disciplinary action, terminate employment, or change the conditions of continued employment, if applicable, and (4) a statement or copy of the statutory provisions regarding the employee or applicant's right to request independent testing of the same sample for verification of the test result. Maryland law permits testing of specimens consisting of blood, urine, hair, and/or saliva only and a breathalyzer test for alcohol is not permitted by the statute, in part because such a sample cannot be preserved for possible re-testing. *See Whye v. Concentra Health Servs., Inc.*, No. 12-cv-03432-ELH, 2013 WL 5375167 (D. Md. Sept. 24, 2013).

14. Is there a medical marijuana statute?

In 2013, Maryland passed its first medical marijuana statute (Md. Code Ann., Health – General § 13-3301 *et seq.*), however, the Medical Cannabis Commission and the associated businesses and individuals (growers, dispensaries, providers, and patients) are still navigating the labyrinthine licensing process. At this time, only a single dispensary has been fully licensed and approved to open for business, only a single grower has successfully completed the licensing process, and that grower's first crop will not be available until September 2017 at the absolute earliest. That said, once the issues are resolved, Maryland-licensed physicians, dentists, podiatrists, and registered nurse practitioners or nurse midwifes who have been approved as certifying physicians by the Medical Cannabis Commission will be able to "prescribe" medical marijuana pursuant to bona fide physician-patient relationship for the following currently-approved conditions: cachexia (weakness or wasting of the body due to severe chronic illness), anorexia, wasting syndrome, severe pain, severe nausea, seizures, severe or persistent muscle spasms, glaucoma, PTSD, and chronic pain.

15. Is there trade secret / confidential information protection for employers?

Maryland has adopted the Uniform Trade Secrets Act (MUTSA) (Md. Code Ann., Commercial Law § 11-1201 *et seq.*), creating a civil action for misappropriation of trade secret(s). MUTSA defines "trade secret" to mean "information, including a formula, pattern, compilation, program, device, method, technique, or process that: (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." MUTSA permits injunctive relief for actual or threatened misappropriation. It authorizes monetary damages including actual loss caused by the misappropriation and unjust enrichment caused by the misappropriation to the extent it's not taken into account in computing actual loss or even a reasonable royalty. It also authorizes exemplary damages in an amount not exceeding two times the damages award. And it permits an award of reasonable attorneys' fees to the prevailing party if a misappropriation claim is made in bad faith, a motion to terminate an injunction is made or resisted in bad faith, or willful and malicious misappropriation exists. An action under MUTSA must be brought within 3 years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered and a continuing misappropriation constitutes a single claim only. Finally, MUTSA constitutes the exclusive remedy except for contractual remedies, other civil remedies, and criminal remedies, whether or not based upon trade secret misappropriation.

16. Is there any law related to employees' privacy rights?

Polygraph Tests—See Section 4 above regarding Maryland's prohibition on employers requiring applicants or employees to submit to polygraph or similar tests. Md. Code. Ann., Labor & Employment § 3-702.

Social Media—See Section 4 above regarding Maryland's prohibition on employers requiring applicants or employees to provide usernames and passwords to personal accounts. Md. Code. Ann., Labor & Employment § 3-712.

Access to Employee Communications—With regard to employees' personal communications, see Section 4 above regarding Maryland's prohibition on employers requiring applicants or employees to provide usernames and passwords to personal accounts. Md. Code. Ann., Labor & Employment § 3-712. With regard to employees' communications via employer-owned property, Maryland's wiretapping laws (Md. Code Ann., Courts & Judicial Proceedings § 10-401 *et seq.*) – unlike federal law and the majority of other States' laws – prohibits the willful interception or disclosure of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device without the prior consent of ***all parties*** to the communication (subject to certain exceptions). The wiretapping laws create a private right of action in employees (and others aggrieved by a violation) to recover actual damages but not less than liquidated damages of $100 a day for each day of violation or $1,000, whichever is higher, punitive damages, and reasonable attorneys' fees and costs. Therefore, any employer who wishes to monitor or record employees' telephone communications, emails, and even Internet browsing must obtain employee consent in advance and also must obtain the consent of any other parties to the communications.

Personal Mail—Employers must take care when handling employee mail because, much like federal law, it is a crime under Maryland law (Md. Code Ann., Criminal Law § 3-905) to take or open a letter addressed to another person without permission from the person to whom it is addressed or the personal representative of the addressee's estate. Thus, unless a letter bears the hallmarks of business correspondence (delivery address typed rather than hand-written, envelope bears a customer's return address, and envelope metered rather than stamped), an employer should deliver it to the addressed employee unopened.

Confidential/Identity Information—Maryland law (Md. Code Ann., Labor and Employment § 3-502) prohibits employers from including Social Security numbers on paychecks and similar documents.

17. Is there any law restricting arbitration in the employment context?

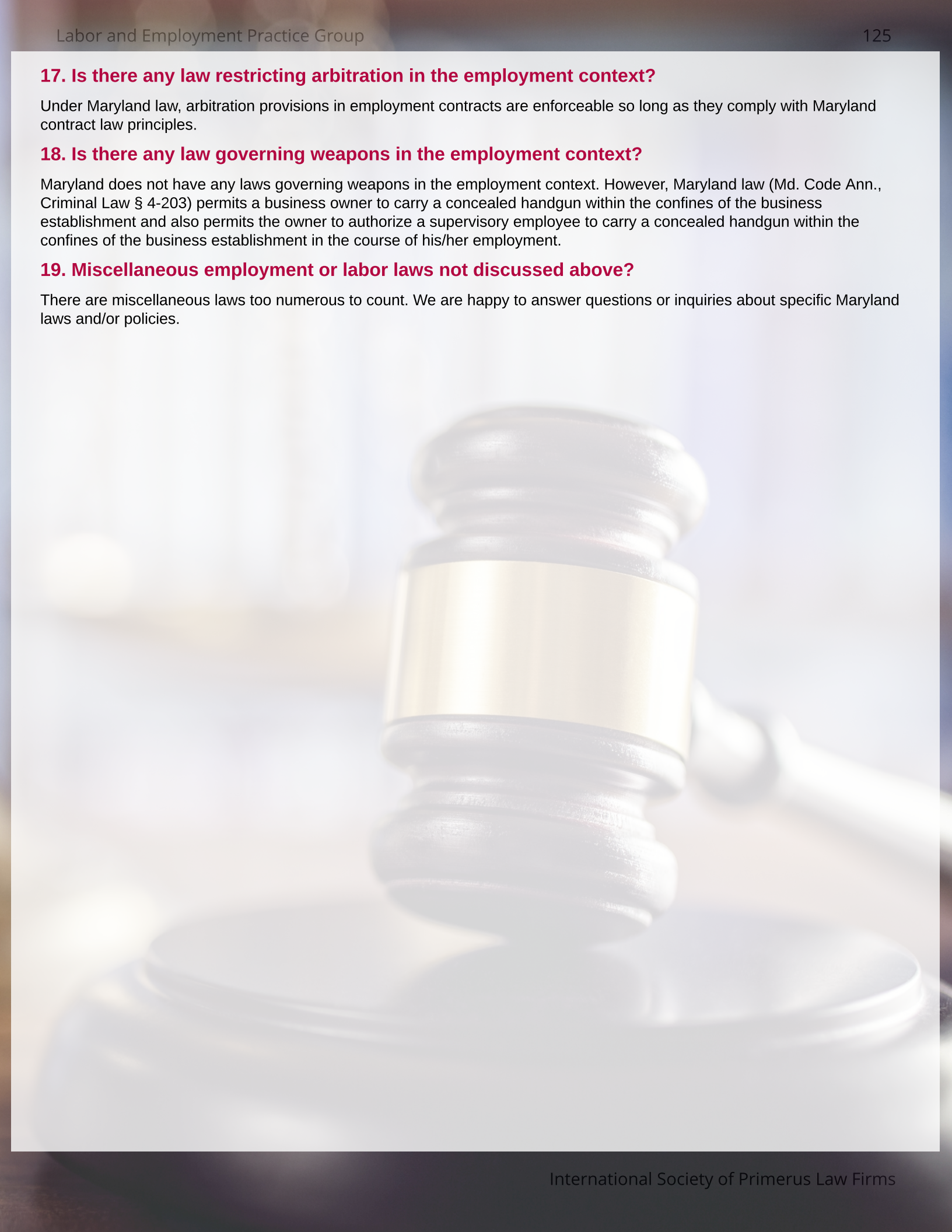
Under Maryland law, arbitration provisions in employment contracts are enforceable so long as they comply with Maryland contract law principles.

18. Is there any law governing weapons in the employment context?

Maryland does not have any laws governing weapons in the employment context. However, Maryland law (Md. Code Ann., Criminal Law § 4-203) permits a business owner to carry a concealed handgun within the confines of the business establishment and also permits the owner to authorize a supervisory employee to carry a concealed handgun within the confines of the business establishment in the course of his/her employment.

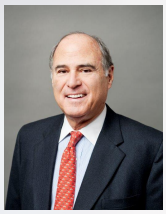
19. Miscellaneous employment or labor laws not discussed above?

There are miscellaneous laws too numerous to count. We are happy to answer questions or inquiries about specific Maryland laws and/or policies.



MASSACHUSETTS

By: Jim Rudolph



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1. Is the state generally an employment-at-will state?

Yes, Massachusetts is generally an employment at-will state. The employer or the employee can terminate the employment relationship at any time, with or without cause or notice, for any reason or for no reason at all, except a reason prohibited by statute or public policy.

2. Are there any statutory exceptions to the employment-at-will doctrine?

Yes. The employment at-will doctrine is limited by a list of statutorily enumerated exceptions that limit the ability of the employer to terminate or make other adverse decisions regarding an employee's employment.

Massachusetts Statutory Exceptions to the Employment-At-Will Doctrine

1. **G.L. c. 12, §5J -- Employers Preventing Employees from Acting to Further False Claim Actions:** No employer shall make, adopt or enforce any rule, regulation or policy preventing an employee, contractor or agent from disclosing information to a government or law enforcement agency or from acting to further efforts to stop 1 or more violations of §5B of this chapter (false claims actions) or §5O of this chapter (agency reporting requirements). No employer shall require as a condition of employment, during the term of employment or at the termination of employment that any employee, contractor or agent agree to, accept or sign an agreement that limits or denies these right.

2. **G.L. c. 111L § 7 – Refusal to Conduct Embryonic Stem Cell Research by Employee; Retaliation Prohibited:** No employee shall be required to conduct scientific research, experimentation or study that involves the creation or use of pre-implantation embryos in relation to human embryonic stem cell research to the extent that such research conflicts with the sincerely-held religious practices or beliefs of the employee.

3. **G.L. c. 112, § 12I – Abortion or Sterilization Procedures; Refusal of Hospital or Health Facility Staff Member or Employees to Participate:** A physician or any other person who is a member of or associated with the medical staff of a hospital or other health facility or any employee of a hospital or other health facility in which an abortion or any sterilization procedure is scheduled and who shall state in writing an objection to such abortion or sterilization procedure on moral or religious grounds, shall not be required to participate in the medical procedures which result in such abortion or sterilization. Moreover, conscientious objection to abortion shall not form the basis for any discriminatory action against such person, such as: dismissal, suspension, demotion, failure to promote, discrimination in hiring, withholding pay, or any other way that would cause the objecting individual to suffer a detriment.

4. **G.L. c. 151B, § 4 – Anti-Discrimination Act; Unlawful Practices**

§ 4(1): It is unlawful for an employer to refuse to hire, employ, or to discharge or bar from employment an individual because of their race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, genetic information, ancestry or status as a veteran. It is also unlawful for an employer to discriminate against such an individual in terms of compensation, conditions, or privileges of employment unless based upon a bona fide occupational qualification.

§ 4(1A): It is unlawful discriminatory practice for an employer to condition either obtaining or retaining employment on grounds that an individual violate or forego the practice of his or her creed or religion as required by that creed or religion.

§ 4(1B): It is unlawful for an employer to refuse to hire, employ, to discharge or bar from employment an individual

because of their age, unless it is based upon a bona fide occupational qualification.

§ 4(1C): It is unlawful for the state or any of its political subdivisions to refuse to hire, employ, or to discharge or bar from employment an individual because of their age.

§ 4(1D): It is unlawful for an employer, employment agency, the state, or any of its political subdivisions to deny initial employment, reemployment, retention in employment, promotion or any benefit of employment to any person who is member, applies to become a member, or has an obligation to serve in a uniformed military service of the United States, including the National Guard.

§ 4(2): It is unlawful for a labor organization to exclude from full membership rights or to expel from its membership such individual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer their race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, genetic information, ancestry or status as a veteran.

§ 4(3): It is unlawful for an employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment, which expresses, directly or indirectly, any limitation, specification or discrimination as to the race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry or status as a veteran, or the handicap of a qualified handicapped person or any intent to make any such limitation, specification or discrimination, unless based upon a bona fide occupational qualification.

§ 4(4): It is unlawful for any person, employer, labor organization, or employment agency to discharge, expel, or other otherwise discriminate against any person because he or she has opposed any practices forbidden under this G.L. c. 151B.

§4(4A): It is unlawful for any person to coerce, intimidate, threaten, or interfere with another person's exercise or enjoyment of any right granted or protected by G.L. c. 151B. This section also makes it unlawful for a person to interfere with a third party for having aided or encouraged any other person in the exercise of enjoyment of any right granted or protected by G.L. c. 151B.

§4(5): It is unlawful for any person, whether an employer or employee, to compel or coerce any individual to do any of the acts G.L. c. 151B § 4 forbids.

§4(9): It is unlawful for an employer to request any information, to make or keep a record of such information, or to use any form of application that requests information regarding an arrest, detention, or disposition regarding any violation of law in which no conviction resulted. This section also prohibits the employer from inquiring about a first conviction for the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace. Lastly this section further bars employers from inquiring about any conviction of a misdemeanor where the date of conviction occurred more than 5 years prior to the date of application, unless the person has been convicted of any offense with five years immediately preceding the date of the application.

§ 4(9 ½): It is unlawful for an employer to request on its initial written application form that the applicant disclose his or her criminal offender record information. However, except as otherwise prohibited by §9, an employer may inquire about any criminal convictions on the application form if: (i) the applicant is applying for a position for which federal or state regulation creates mandatory disqualification based on a conviction of one (1) or more types or criminal offense; or (ii) the employer is subject to an obligation imposed by federal or state law or regulation not to employ persons who have been convicted of one (1) or more criminal offenses.

§4(9A): It is unlawful for an employer to refuse to hire, employ, or to bar or discharge from employment any person by reason of his her or her failure to disclose information regarding his or her admission, voluntarily or involuntarily, to any public or private facility for the care and treatment of mentally ill persons, provided that such person has been discharged from such facility or facilities and can prove by a psychiatrist's certification that he or she is mentally competent to perform the job for which he or she is applying for or holding.

§4(11A): It is unlawful for an employer to refuse to restore certain employees to employment following an absence due to parental leave taken pursuant to G.L. c. 149 § 105D or to otherwise fail to comply with that section. This section also applies to the state and any of is boards, departments, and commissions to deny vacation credit to an employee for the fiscal year during which the employee is absent due to parental leave taken to G.L. c. 149 § 105D, or to impose any other penalty because of a parental leave of absence.

§4(16): It is unlawful for an employer to dismiss from employment or refuse to hire, rehire or advance in employment or otherwise discriminate against, because of his handicap, any person alleging to be a qualified handicapped person, capable of performing the essential functions of the position involved with reasonable accommodation, unless the employer can demonstrate that the accommodation required to be made to the physical or mental limitations of the person would impose an undue hardship to the employer's business.

§4(16A): It is unlawful for an employer to sexually harass any employee.

5. **G.L. c. 111, § 70(f) – AIDS Testing:** An employer may not condition employment of either a potential or current employee taking HTLV-III antibody or antigen tests.

6. **G.L. c. 111, §72G** – **Reports of Abuse of Patients:** No facility, home health agency or hospice program is allowed to discharge or in any manner discriminate or retaliate against any person who, in good faith, makes a report that a patient is or resident is being abused, mistreated, neglected, or having property misappropriated.

7. **G.L. c. 136, § 13 – Holiday Discrimination:** It is unlawful for retail establishments to discriminate against employees for refusing to work on certain legal holidays. Moreover, this statue also requires that retail establishments pay employees working on certain holidays one and half times their regular pay.

8. **G.L. c. 149, § 6D** – **Complaints by Employees Relating to Asbestos:** No employee shall be penalized by an employer in any way as a result of such employee's filing of a complaint or otherwise providing notice to the department in regard to the occupational health and safety of such employee or other workers engaged in the use, handling, removal or disposal of asbestos or materials containing asbestos.

9. **G.L. c. 149, § 19B – Lie Detector Tests; Use as Condition of Employment:** An employer is prohibited from subjecting or requesting any current employee, or any person applying for employment, including any person applying for employment as a police officer, to take a lie detector test within or outside the state. The employer is further prohibited from discharging, refusing to hire, demoting, or otherwise discriminating against an individual asserting this right.

10. **G.L. c. 149, § 19** – **Prevention of Employment:** No person shall, by intimidation or force, prevent or seek to prevent a person from entering into or continuing in the employment of any person.

11. **G.L. c. 149, § 52E – Leave from Work When Employee Is Involved with Abusive Behavior**

§52E(7)(h): No employer shall coerce, interfere with, restrain or deny the exercise of, or any attempt to exercise, any rights provided under this section or to make leave requested or taken hereunder contingent upon whether or not the victim maintains contact with the alleged abuser.

§52E(7)(i): No employer shall discharge or in any other manner discriminate against an employee for exercising the employee's rights under this section. The taking of leave under this section shall not result in the loss of any employment benefit accrued prior to the date on which the leave taken under this section commenced. Upon the employee's return from such leave, the employee shall be entitled to restoration to the employee's original job or to an equivalent position.

12. **G.L. c. 149, § 148A – Employees pursuing Wage and Hour Rights:** No employee shall be penalized by an employer in any way as a result of any action on the part of an employee to seek his or her rights under the wage and hour provisions of this chapter.

13. **G.L. c. 149, § 148C(h) – Earned Sick Time Retaliation:** It is unlawful for an employer to interfere with, restrain or deny an employee to exercise or attempt to exercise earned sick leave. The employer is prohibited from using the fact that the employee exercised earned sick leave as a negative factor in any employment action, such as evaluation, promotion, disciplinary action or termination.

14. **G.L. c. 149 § 185 -- Retaliation Against Employees Reporting Violations of Law or Risks to Public Health, Safety or Environment:** An employer shall not take any retaliatory action against an employee because the employee**:**

(1) Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer, that the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law, or which the employee reasonably believes poses a risk to public health, safety or the environment;

(2) Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation promulgated pursuant to law, or activity, policy or practice which the employee reasonably believes poses a risk to public health, safety or the environment by the employer; or

(3) Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes is in

violation of a law, or a rule or regulation promulgated pursuant to law, or which the employee reasonably believes poses a risk to public health, safety or the environment.

15. **G.L. c. 149, § 187** – **Health Care Providers; Protection from Retaliatory Action:** A health care facility shall not refuse to hire, terminate a contractual agreement with or take any retaliatory action against a health care provider because the health care provider does any of the following:

(1) discloses or threatens to disclose to a manager or to a public body an activity, policy or practice of the health care facility that the health care provider reasonably believes is in violation of a law or rule or regulation promulgated pursuant to law or violation of professional standards of practice which the health care provider reasonably believes poses a risk to public health;

(2) provides information to or testifies before any public body conducting an investigation, hearing or inquiry into any violation of a law, or rule or regulation promulgated pursuant to law or activity, policy or professional standards of practice of a health care provider, by the health care facility which the health care provider reasonably believes poses a risk to public health;

(3) objects to or refuses to participate in any activity, policy or practice of the health care facility which the health care provider reasonably believes is in violation of a law or rule or regulation promulgated pursuant to law or violation of professional standards of practice which the health care provider reasonably believes poses a risk to public health; or

(4) participates in any committee or peer review process, files a report or a complaint, or an incident report discussing allegations of unsafe, dangerous or potentially dangerous care.

16. **G.L. c. 149, § 100 – Hours of Work Without Interval for Meal:** An employer is prohibited from requiring an employee to work more than six (6) hours during a calendar day without an interval of at least thirty (30) minutes for a meal. A violation of this section is punishable by a fine not less than three hundred (300) dollars, but not more than six hundred (600) dollars.

17. **G.L. c. 150A, § 4** – **Unfair Labor Practices by Employers:** It shall be an unfair labor practice for an employer:

(1) To interfere with, restrain, or coerce employees in the exercise of the right to engage in collective bargaining agreements.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.

(3) To discriminate in regards to hiring or tenure of employment or any term or condition of employment, to encourage or discourage membership in any labor organization.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this chapter.

(5) To refuse to bargain collectively with the representatives of his employees.

(6) To discharge or otherwise discriminate against any employee because he is not a member in good standing of a labor organization with whom the employer has made an agreement to require as a condition of employment membership, unless:

a. The labor certified to the employer that such employee:

i. Was denied admission to or deprived of membership in good standing as a result of a bona fide occupational disqualification or the administration of discipline; and

ii. Has exhausted the remedies available to him within the labor organization.

18. **G.L. c. 150E, § 10 – Prohibited Practices of Public Employers:** This section is the same as G.L. c. 150A, § 4 but is applied to public sector employers and their representatives.

19. **G.L. c. 152, § 75B – Workers' Compensation Retaliation:** No employer shall discharge, refuse to hire or in any other manner discriminate against an employee because the employee has pursued workers' compensation rights.

20. **G.L. c. 268, § 14A – Jury Duty Exception:** No person shall be discharged from or deprived of his or her employment because of his or her attendance or service as a grand or traverse juror in any court. An employer who violates this section will be in contempt of the court upon which the employee is serving or attending.

21. **G.L. c. 19, § 11** – **Retaliation for Reporting Abuse:** No person shall discharge or cause to be discharged or

otherwise discipline or in any manner discriminate against or thereafter take retaliatory action against any employee for filing a report with the Disabled Persons Protection Commission, which is established in G.L. c. 19, § 2.

22. **G.L. c. 19A, § 15** – **Reports of Elderly Abuse:** No employer or supervisor may discharge, demote, transfer, reduce pay, benefits or work privileges, prepare a negative work performance evaluation, or take any other action detrimental to an employee or supervisee who files a report which states he or she has reasonable cause to believe that an elderly person is suffering from or has died as a result of abuse.

23. **G.L. c. 268, § 14B** – **Witnesses in Criminal Actions; Discharge from Employment:** Any person who is a victim of a crime upon which an accusatory instrument is based, or is subpoenaed to attend a criminal action as a witness and who notifies his employer of such subpoena prior to the day of his attendance, shall not be subject to discharge or penalty by said employer on account of his absence from employment by reason of such witness service.

3. Are there any public policy exceptions to the employment-at-will doctrine?

Yes, the employment-at-will doctrine is limited by several public policy exceptions.

Public Policy Exceptions to the Employment At-Will Doctrine

1.**Discharge for An Employee's Refusal to Violate the Law**: It is statutorily established that an employer is prohibited from discharging an employee for refusing to violate the law, or "for doing what the law requires (e.g., serving on a jury - G.L. c. 268, § 14A), or refusing to do that which the law forbids (e.g., committing perjury). Smith-Pfeffer v. Superintendent of the Walter E. Fernald State School, 404 Mass. 145, 148 (1989); *see generally* Mello v. Stop & Shop Companies, Inc., 402 Mass. 555, 557 (1988).

2.**Discharge for An Employee Engaging in Legislatively Encouraged Conduct**: An employer is barred from discharging an employee for engaging in conduct that, while not legally required, is clearly encouraged by the Legislature. For example, cooperating with a government investigation. Flesner v. Technical Communications Corp., 410 Mass. 805, 810 (1991).

3.**Discharge in Retaliation for an Employee Exercising a Legally Guaranteed Right against Employer**: An employer is forbidden from discharging an employee because the employee chose to exercise a legally guaranteed right against the employer. For example, an employer cannot discharge an employee who files a workers' compensation claim against it. Smith-Pfeffer v. Superintendent of the Walter E. Fernald State School, 404 Mass. 145, 149 (1989).

4.**Discharge for Enforcing Safety Laws**: An employer cannot terminate an employee for enforcing a safety law that he or she is responsible to enforce. Hobson v. McLean Hosp. Corp., 402 Mass. 413, 416 (1988).

The Public Policy Exception Generally Barred from Being Used to Supplement an Existing Statutory Remedy: Where the relevant statute provides a remedial scheme, no common law wrongful discharge claim based on a violation of public policy will be recognized. Melley v. Gillette Corp., 19 Mass. App. Ct. 511 (1985), *aff'd*, 397 Mass. 1004 (1986).

1.**"Extraordinary" Circumstances**: While this general prohibition from asserting a common law wrongful discharge claim based on public policy is rather concrete, there are exceptional cases where an employee may be able to claim relief under either or both remedies. If the statute specifically does not provide for a remedy, the common law wrongful discharge claim will not be precluded. However, an employee may also be able to seek relief if the public policy matter in question was established prior to the enactment of the statute and said statute does not provide that it was intended by the Legislature to provide an exclusive remedy. In such a situation, the common law remedy will not automatically be precluded, but rather it will be used to supplement the relevant statute. *See generally* Comey v. Hill co., 387 Mass. 11, 20 (1982).

4. Is there any law related to the hiring process?

a. **G.L. c. 149, § 19C** – **Employment of Aliens Restricted; Regulations; Penalty:** It is unlawful for any employer to knowingly employ any alien in the state, who is a student, visitor, or who has not been admitted to the United States for permanent residence, except those who are admitted under a work permit, or unless the employment of such alien is authorized by the attorney general of the United States.

b. **G.L. c. 149, § 52B -- Employment applications; Volunteer Work as Experience:** Employment applications that seek information about an applicant's previous work history or experience must include a statement that allows the applicant to include verifiable volunteer work.

c. **G.L. c. 276, § 100A** – **Requests to Seal Files; Conditions; Application of Section; Effect of Sealing of Records:** An

employment application seeking information about convictions must include the following language:

1.An applicant for employment with a sealed record on file with the commissioner of probation may answer “no record” with respect to an inquiry herein relative to prior arrests, criminal court appearances or convictions.... In addition, any applicant for employment may answer ‘no record’ with respect to any inquiry relative to prior arrests, court appearances and adjudications in all cases of delinquency or as a child in need of services which did not result in a complaint transferred to the superior court for criminal prosecution.

d. **G.L. c. 151B, § 4(9)** – **Unlawful Practices**: Prohibits an employer from requesting (in writing or orally), making a record of, or using an application form to request arrest records and from refusing to employ someone for not furnishing information regarding the following:

1.prior arrests not resulting in a conviction;

2.prior first-time convictions for drunkenness;

3.simple assault;

4.speeding;

5.minor traffic violations;

6.affray or disturbing the peace; or

7.convictions for misdemeanors where the date of the conviction or the completion of a prison sentence resulting therefrom ended five or more years earlier.

e. **G.L. c. 151B, § 4(9 ½)** – **Unlawful Practices:** Prohibits an employer from asking an applicant on an initial written employment application prior to an interview about his or her criminal history or whether he or she has been convicted of a felony or misdemeanor.

f. **G.L. c. 6, § 172 – Maintenance of Criminal Offender Record Information; Use and Dissemination of Criminal Offender Record Information**: An employer in possession of an applicant's criminal offender record information must, regardless of whether the information was obtained from the Commonwealth or from some other source, provide the applicant with a copy of such information prior to questioning the applicant about his or her criminal history, or if the employer makes a decision adverse to the applicant based on the information.

g. **G.L. c. 6, § 171A – Right of Applicant to Criminal History Record Prior to Questioning or Adverse Decision**: Employers that conduct five or more criminal background investigations annually must implement a written criminal offender record information policy**.**

h. **G.L. c. 149, §19B** – **Lie Detector Tests; Use as Condition of Employment; Penalty; Civil Action:** It is unlawful in Massachusetts to require or administer a lie detector test as a condition of employment or continued employment. An employer who violates this law shall be subject to criminal penalties and civil liability.

i. **G.L. c. 90F, § 4** – **Commercial Motor Vehicle Operators**: Employers must require applicants for jobs as commercial motor vehicle drivers to provide a list of the names and addresses of employers for whom they have worked as commercial motor vehicle drivers for the last ten years, including the dates of their employment and reasons for leaving. Applicants are required to certify that such information is true and complete.

j. **G.L. c. 93, § 51 – Consumer Report; Circumstances Under Which Reporting Agency May Furnish**: A consumer reporting agency may furnish a consumer report to a person which it reasonably believes intends to use the information for employment purposes.

k. **G.L. c. 214, § 1B** – **Massachusetts Privacy Act**: A person shall have a right against unreasonable, substantial or serious interference with his privacy**.**

1.**Applies to Employer’s Right to Drug Test:** In determining whether an employer's drug testing policy violates its employees' rights under the Privacy Act, the employee's interest in privacy is balanced against the employer's competing interest in determining whether its employees are using drugs. Webster v. Motorola, Inc., 418 Mass. 42 (1994).

2.**Applies to Employer’s Right to Access Medical Records**: Employer may have a substantial and valid interest in aspects of employee's health that could affect employee's ability effectively to perform job duties; accordingly, when medical information is necessary reasonably to serve such a substantial and valid interest of employer, it is not an invasion of privacy under Massachusetts statute for a physician to disclose such information to employer. Carmack v. National R.R. Passenger Corp., 486 F. Supp. 2d 58 (D. Mass. 2007).

3. **G.L. c. 151B, § 4(16)** – **Unlawful Practices**: An employer may not inquire whether an applicant is disabled or about the nature or severity of any disability.

4. **G.L. c. 152, § 75B(2)** – **Qualified Handicapped Persons**: An employer may not refuse to hire or otherwise discriminate against an individual because he or she has filed a workers' compensation claim or testified or cooperated in any workers' compensation proceeding.

l. **G.L. c. 151B, § 4(19) – Unlawful Practices**: An employer is prohibited from seeking or using genetic information or a genetic test or its results as a condition of or to affect a person's employment.

5. Does the state recognize implied employment contracts under employment handbooks, policies, or practices?

Yes, Massachusetts courts have routinely held that promises made in a personnel manual may create an employment contract which is binding on the employer, either express of implied. *See* Jackson v. Action for Boston Cmty. Dev., Inc., 403 Mass. 8, 13 (1988); Monaco v. Lombard Bros., 24 Mass. App. Ct. 941, 942-43 (1987). Massachusetts Courts generally use the following factors in making such a determination: (i) conduct of the employee; (ii) conduct of the employer; (iii) negotiations; (iv) stated term of employment; (v) employer's right to unilaterally modify the manual versus employee's reasonable belief that employment would continue according to the terms set forth in the manual; (v) disclaimers; (vi) employees "reasonable belief" that the employer would adhere to the terms of the manual; and (vii) progressive discipline policies (where an employer's manual contains a progressive discipline policy, excepting only major infractions, the employer's failure to use progressive discipline for a lesser offense could constitute a breach of the employment contract).

6. Does the state have a right to work law or other labor / management laws?

a. **G.L. c. 149, § 19** – **Prevention of Employment:** "No person shall, by intimidation or force, prevent or seek to prevent a person from entering into or continuing in the employment of any person."

b. **G.L. c. 149, §20** – **Coercion of agreement not to join a labor organization:** "No person shall, himself or by his agent, coerce or compel a person into a written or oral agreement not to join or become a member of a labor organization as a condition of his securing employment or continuing in the employment of such person."

c. **G.L. c. 149, § 20D** – **Solicitation, acceptance or payment of money to encourage or discourage formation or functioning of a labor organization: "**No employer and no person retained or engaged by him as a labor relations expert, adviser or consultant or retained or engaged by such employer for the purpose of dealing or negotiating with any of his employees or with any labor organization representing or seeking to represent or organize such employees shall, himself or by his agent, pay or deliver or agree to pay or deliver, directly or indirectly, to any employee or to any group or committee of employees, nor shall any employee or labor union official solicit or accept from any employer or any person so retained or engaged by him, or his agent, any money or other thing of value for the purpose of encouraging or discouraging, or in any way interfering with, any employee or employees in exercising their rights to organize or to select a representative, or for the purpose of preventing the continued existence, operation or functioning of a labor organization…"

7. What tort claims are recognized in the employment context?

a. Massachusetts recognizes tort claims in the employment context, but the application of tort claims are limited by the Massachusetts Fair Employment Practices Act, G.L. c. 151B, the Massachusetts Workers' Compensation Act, G.L. c. 152 and other federal laws. Where tort claims are permitted, the plaintiff has a right to a jury trial. Generally, attorney's fees for tort claims are not recoverable.

1.The Massachusetts Fair Employment Practices Act G.L. c. 151B prohibits discrimination in the employment context and also prohibits harassment or other discriminatory conduct on the basis of membership in a protected class (as enumerated in the statute). G.L. c. 151B provides a remedial scheme which requires an employee alleging employment discrimination to file a charge with the Massachusetts Commission Against Discrimination (MCAD) within 300 days of the alleged conduct. Filing a charge with the MCAD begins the administrative process and is a prerequisite to filing a civil action in the trial court system pursuant to G.L. c. 151B. *See* Green v. Wyman-Gordon, Co., 422 Mass. 551, 557-58 (1996)

2.The Massachusetts Workers' Compensation Act, G.L. c. 152 bars common law actions against employers where (i) the plaintiff is an employee; (ii) the plaintiff's condition is a personal injury within the meaning of the Act; and (iii) the injury arises out of and in the course of the plaintiff's employment. Foley v. Polaroid Corp. (Foley I), 381 Mass. 545, 548-49 (1980).

b. Types of Tort Claims Recognized in the Employment Context

1. **Defamation:** Publication of a false statement of fact by the employer that causes the employee economic loss, public

hatred, ridicule, or contempt in a considerable and respectable class in the community. Phelan v. May Dep't Stores Co., 443 Mass. 52 (2004); White v. Blue Cross & Blue Shield of Mass., Inc., 442 Mass. 64 (2004); Boyle v. Barnstable Police Dep't, 818 F. Supp. 2d 284 (D. Mass. 2011); McAvoy v. Schufrin, 401 Mass. 593, 597-98 (1988); Peck v. Wakefield Item Co., 280 Mass. 451 (1932). Recovery can include damages for lost wages, mental suffering and harm to reputation. Murphy v. Boston Herald, Inc., 449 Mass. 42, 67 (2007); Shafir v. Steele, 431 Mass. 365 (2000). Punitive damages cannot be awarded. *See* G.L. c. 231, § 93.

2. **Interference with Contractual Relationships:** The plaintiff must show that the plaintiff had a contract with a third party, that the defendant knowingly induced the third party to breach the contract or interfered with the plaintiff's performance of the contract, the interference was improper and that the plaintiff was harmed by the interference. N. Shore Pharm. Servs. v. Breslin Assocs. Consulting LLC, 491 F. Supp. 2d 111, 129 (D. Mass. 2007); Shafir v. Steele, 431 Mass. 365 (2000). However, an employee cannot sue his/her employer for intentional interference with its own contract. Harrison v. NetCentric Corp., 433 Mass. 465, 476 (2001). Damages may include recovery for economic losses, foreseeable consequential economic losses, and foreseeable emotional distress.

3. **Interference with Advantageous Relationships:** The plaintiff must show the existence of a business relationship or a contemplated relationship for economic benefit, that the defendant had knowledge of the relationship, that the defendant intentionally and improperly interfered and that the plaintiff's loss of the relationship directly resulted from the defendant's conduct. Welch v. Ciampa, 542 F.3d 927, 944 (1st Cir. 2008); Galdauckas v. Interstate Hotels Corp. No. 16, 901 F. Supp. 454 (D. Mass. 1995). Damages may include recovery for economic losses, foreseeable consequential economic losses, and foreseeable emotional distress.

4. **Intentional Infliction of Emotional Distress**: This tort is generally precluded by the Workers' Compensation Act, but may be permitted when the conduct was not in the course of or in furtherance of employment. The plaintiff must prove that the defendant acted in an extreme or outrageous manner, that the defendant intended to cause emotional distress or he or she knew or should have known that emotional distress was likely to occur, that the distress was severe and of a nature that no reasonable person could be expected to endure, and that the defendant's actions resulted directly in the plaintiff's distress. Doe v. Fournier, 851 F. Supp. 2d 207 (D. Mass. 2012); Ruffino v. State St. Bank & Trust Co., 908 F. Supp. 1019 (D. Mass. 1995). To be considered extreme and outrageous, the conduct must be so severe as to go beyond the bounds of decency that no reasonable person could be expected to endure it. Mello v. Stop & Shop Cos., 402 Mass. 555 (1988); Jones v. City of Boston, 738 F. Supp. 604, 607 (D. Mass. 1990).

5. **Negligent Infliction of Emotional Distress:** The plaintiff must prove that the defendant was negligent, the negligent act caused emotional distress, the emotional distress either caused or was caused by physical harm or injury and that the physical harm or injury was manifested by objective symptoms and that the emotional distress was foreseeable. Payton v. Abbott Labs., 386 Mass. 540, 557 (1982); Ferriter v. Daniel O'Connell's Sons, 381 Mass. 507 (1980).

6. **False Imprisonment**: The plaintiff must prove the intentional and unjustified confinement, either directly or indirectly, which the plaintiff was aware of or was harmed by. Ball v. Wal-Mart, Inc., 102 F. Supp. 2d 44 (D. Mass. 2000). Damages are based on the direct result of the wrongful confinement, including loss of time and emotional distress.

7. **Assault and Battery:** This tort is generally precluded by the Workers' Compensation Act, but may be permitted when the conduct was not in the course of or in furtherance of employment. O'Connell v. Chasdi, 400 Mass. 686, 690-91 (1987). Assault is the creation of an apprehension of immediate physical harm by means of an overt gesture. Words alone are not sufficient. Battery is the intent to cause a harmful or offensive contact with the plaintiff or another. Recovery may include damages for actual bodily injury and/or humiliation, indignity and emotional distress.

8. **Malicious Prosecution:** The plaintiff must prove that he or she was damaged because the defendant instituted criminal or civil proceedings against him or her with malice or improper purpose and without probable cause, and that the proceedings terminated in the plaintiff's favor. Beecy v. Pucciarelli, 387 Mass. 589, 593 (1982). Recovery may include damages flowing from the tort, including the costs associated with defending the underlying action, loss of earnings, and emotional distress. Moriearty, Adkins, Rubin & Jackson, Employment Law (45 Massachusetts Practice Series) § 6.43 (West 2d ed. 2003).

9. **Abuse of Process**: The plaintiff must prove that process was used for an ulterior or illegitimate purpose resulting in damage. Datacomm Interface, Inc. v. Computerworld, Inc., 396 Mass. 760, 775-76 (1986). Recovery may include damages for all consequences of the abuse of process.

10. **Fraud/Misrepresentation**: The plaintiff must prove that the defendant made a false representation of material fact, with knowledge of its falsity, for the purpose of inducing the plaintiff to act, and that the plaintiff relied upon the representation as true and acted upon it to his/her detriment. Damon v. Sun Co., Inc., 87 F.3d 1467, 1471-72 (1st Cir. 1996). A claim for Negligent Misrepresentation also exists if the defendant fails to exercise reasonable care or competence in obtaining and communicating the information. Lawton v. Dracousis, 14 Mass. App. Ct. 164, 171 (1982). Recovery is

generally based on actual loss suffered by the plaintiff.

8. Is there a common law or statutory prohibition against discrimination / hostile work environment?

a. The Massachusetts Fair Employment Practices Act G.L. c. 151B is the state's primary civil rights law regarding discrimination in employment. It prohibits discrimination based on Race, Color, Religious Creed, National Origin, Sex, Gender Identity, Sexual Orientation, Age, Handicap Status, Genetic Information, Pregnancy, Ancestry, Status as a Veteran and Handicap Status in the employment context and also prohibits harassment or other discriminatory conduct on the basis of being a member of a protected class.

1.The Massachusetts Commission Against Discrimination (MCAD) is responsible for enforcing the Commonwealth's anti-discrimination laws in order to protect, preserve, and enhance the civil rights of its citizens. The MCAD is charged with primary enforcement responsibility; it has both investigatory and adjudicatory powers. All complaints alleging a violation of G.L. c. 151B must commence with the filing of a charge of discrimination with the MCAD. Absent tolling of the statute or other exception, failure to file a charge with the MCAD within 300 days of the discriminatory event is fatal to an employee's claim of discrimination. The statute of limitations is extended if there is a continuing violation, such as where the violation is ongoing or is of a recurring nature. After filing the charge, a party may remove the matter from the MCAD and institute a civil action in Superior Court. A jury trial is available.

2.To establish a hostile work environment claim under state law, the plaintiff must show verbal or physical conduct that is unwelcome, that has the purpose of creating a hostile or humiliating or offensive work environment and that interferes with the plaintiff's ability to perform his or her job. *See* College-Town, Div. of Interco, Inc. v. MCAD, 400 Mass. 156, 162 (1987); Johnson v. Daniels Bros. Auto Sales, Inc., 18 M.D.L.R. 194, 196 (1996). The plaintiff must show that the conduct was sufficiently severe or pervasive to create a hostile environment.

3.Damages may include issuance of a cease and desist order; back pay and front pay; require hiring, reinstatement or promotion of the employee, with or without back pay; lost wages, benefits, emotional distress, injunctive relief, attorney's fees, costs, etc; the Superior Court may also award punitive damages pursuant to G.L. c. 151B, § 9; treble damages are available for age discrimination; and there is exposure for civil penalties imposed by the MCAD. Attorneys' fees are generally not recoverable.

9. Is there a common law or statutory prohibition of retaliation?

a. **G.L. c. 111, §226** – Mandatory Overtime for Nurses Prohibited Except for Emergency Situations – Retaliation for Nurse's Refusal to Work is Prohibited

b. **G.L. c. 111L § 7** – Refusal to Conduct Embryonic Stem Cell Research by Employee; Retaliation Prohibited

c. **G.L. c. 112, § 12I** – Abortion or Sterilization Procedures; Refusal of Hospital or Health Facility Staff Member or Employees to Participate

d. **G.L. c. 151B, § 4** – Anti-Discrimination Act; Unlawful Practices

e. **G.L. c. 111, §72G** – Reports of Abuse of Patients

f. **G.L. c. 136, § 13** – Holiday Discrimination

g. **G.L. c. 149, § 6D** – Complaints by Employees Relating to Asbestos

h. **G.L. c. 149, § 52E** – Leave from Work When Employee Is Involved with Abusive Behavior

i. **G.L. c. 149, § 19B** – Lie Detector Tests; Use as A Condition of Employment

j. **G.L. c. 149, § 148C** – Earned Sick Time Retaliation

k. **G.L. c. 149, § 185** – Retaliation Against Employees Reporting Violations of Law

l. **G.L. c. 149, § 187** – Health Care Providers; Protection from Retaliatory Action

m. **G.L. c. 149, §148A** – Retaliation Against Employee's Reported Wage & Hour Violations Prohibited

n. **G.L. c. 149, § 158C** – Retaliation for Employee's Use of Earned Sick Time Prohibited

o. **G.L. c. 149, § 190 –** Retaliation for Engaging in Protected Activity Under Domestic Workers Bill of Rights is Prohibited

p. **G.L. c. 151, §19** – Retaliation Against Employee's Reported Wage & Hour Violations Prohibited

q. **G.L. c. 150A, § 4** – Unfair Labor Practices by Employers

r. **G.L. c. 150E, § 10** – Prohibited Practices of Public Employers

s. **G.L. c. 268, § 14A** – Jury Duty Exception

t. **G.L. c. 55, § 16** – Requiring Political Contributions of Persons in Public Service

u. **G.L. c. 19, § 11** – Reports of Elderly Abuse

v. **G.L. c. 268, § 14B** – Witnesses in Criminal Actions; Discharge from Employment

10. Is the state a deferral state for charges filled with the EEOC?

Massachusetts is a deferral state. The Massachusetts Commission Against Discrimination (MCAD) has a work sharing agreement with the EEOC under which claims filed with either the MCAD or the EEOC are automatically filed with both agencies.

11. Are there any state laws related to compensation, including wage and hour, paid time off, mandatory breaks, fringe benefits, allowable deductions, prevailing wage rates for public contracts, etc.?

a. **G.L. c. 149, § 148** – **Massachusetts Wage Act:** The purpose of the Massachusetts Wage Act is to prevent the unreasonable detention of wages by employers. Once an employee has completed the labor, service, or performance required, the employee has earned his "wage" for purposes of the Massachusetts Wage Act. The Massachusetts Wage Act governs the payment of base wages, commissions, vacation and holiday pay. It does not cover bonuses, severance or any other form of discretionary payment.

b. **G. L. c. 149, § 26-27H** – **Massachusetts Prevailing Wage Act:** Governs the payment of wages for employees working on public construction and non-construction projects. The Massachusetts Department of Labor Standards sets prevailing wage rates, and issues prevailing wage rate schedules for all public works projects. There is no minimum dollar threshold.

c. **G.L. c. 149, § 105A – Massachusetts Equal Pay Act:** Prohibits employers from discriminating in the payment of wages based on gender.

d. **G.L. c. 149, § 100 – Hours of Work Without Interval for a Meal:** Prohibits an employer from requiring an employee to work more than six (6) hours per day without an interval of at least thirty (30) minutes for a meal.

e. **G.L. c. 149, § 48 – One Day of Rest in Seven:** Requires employers in manufacturing, mechanical, or mercantile establishments to give employees an unbroken twenty-four-hour period of rest after six consecutive days of work.

f. **G.L. c. 149, § 148C – Earned Sick Time:** The purpose of the law is to offer employees job protection when taking time off to take care of themselves or certain family members who are sick, or to deal with the effects of domestic violence. Earned sick time, for employers with 11 or more employees, is to be paid at the same rate as the employee's regular wage, excluding overtime or premium rates. Employees are entitle to accrue 1 hour of sick time for every 30 hours worked.

g. **G.L. c. 149, § 150 – Wage Act Private Right of Action:** Provides a private right of action to employees to bring an individual or class action lawsuit for unpaid wages. A successful employee is entitled to a mandatory award of treble damages, attorneys' fees and costs.

h. **G.L. c. 149, § 152A – Massachusetts Tip-Sharing Act:** Authorizes sharing of service charge only among employees whose primary duty is to directly serve customers and who have no managerial responsibility. As of January 1, 2017, the minimum wage for tipped employees (employees who receive more than $20 a month in tips) is $3.75 per hour.

i. **G.L. c. 151, § 1 – Minimum Fair Wages Act:** Minimum wage under Massachusetts law must exceed the federal minimum wage rate by at least $0.50. The minimum wage is $11 per hour as of January 1, 2017.

j. **G.L. c. 151, § 1A – Overtime Compensation:** Most employees must be paid one and one-half times their regular hourly rate for all hours worked in excess of 40 hours in a given work week. State law does not require overtime after eight hours in a day. The regular rate of pay is the hourly rate actually paid to the employee for the normal, non-overtime workweek for which he is employed. The statute contains a number of exemptions, most of which mirror the FLSA.

k. **G.L. c. 151, § 19 – Punishment for Stated Acts:** An employer's failure to keep records may subject employers to civil and criminal penalties. A violation of this statute without willful intent may result in criminal penalties, with a maximum fine of $10,000 or up to six months imprisonment or both for a first offense.

l. **G.L. c. 151A, § 1 – Unemployment Insurance:** Unemployment compensation is governed by employment and training law, which was enacted to afford relief to those who are unemployed through no fault of their own.

m. **G.L. c. 152, § 1 – Massachusetts Worker's Compensation Act:** Employers in Massachusetts have certain obligations

under Massachusetts General Laws, Chapter 152, the Workers' Compensation Act. The purpose of the act is to compensate an injured employee for the impairment of his earning capacity. A workers' compensation claim may arise from an injury or an accident or an occupational disease arising out of and in the course of employment. The claim is usually for monetary benefits covering temporary disability or permanent incapacity, or both. In the event of the death of an employee, a claim may arise for dependency benefits.

12. Is there a state statute governing paid or unpaid leaves?

a. **G.L. c. 149, § 105D – Massachusetts Parental Leave Act:** Employers with 6 or more employees must provide eight weeks of job protected unpaid leave to give birth, adopt a child under the age of eighteen, or adopt a child under the age of twenty-three if that child is physically or mentally disabled. Must be provided to both male and female employees.

b. **G.L. c. 149, § 52D – Small Necessities Leave Act (SNLA):** Employees are eligible for the 24 hours of leave under the statute if their employer has 50 or more employees. For purposes of determining the number of employees, the statute includes all employees of the same employer working within 75 miles of the worksite of the employee requesting the leave. The 24 hours of leave may be taken by an eligible employee for any of the following purposes:

1.To participate in school activities directly related to the educational advancement of a son or daughter of the employee, such as parent-teacher conferences or interviewing for a new school;

2.To accompany the son or daughter of the employee to routine medical or dental appointments, such as check-ups or vaccinations; or

3.To accompany an elderly relative of the employee to routine medical or dental appointments or appointments for other professional services related to the elder's care, such as interviewing at nursing or group homes.

c. **G.L. c. 234A, § 48 – Payment of Jurors:** An employer must pay full-time, part-time, temporary, and even casual employees their regular wages for the first three days of jury duty.

d. **G.L. c. 268, § 14A – Juror Discharged from Employment:** Prohibits discharge of an employee for missing work due to service on a jury.

e. **G.L. c. 49, § 178 – Time Off to Vote:** Employers are required to grant employees a leave of absence to vote during the two hours after the polls open in their districts.

f. **G.L. c. 149, 52E** – ***An Act Relative to Domestic Violence***

1.Employers who employ 50 or more employees must provide up to 15 days of paid or unpaid leave for a qualifying worker to:

seek or obtain medical attention, counseling, victim services or legal assistance;

secure housing;

obtain a protective order from a court;

appear in court or before a grand jury;

meet with a district attorney or other law enforcement official;

attend child custody proceedings; or

address other issues directly related to the abusive behavior against the employee or family member of the employee.

2.To qualify, the worker must be a paid employee who is a victim of domestic violence, sexual assault, stalking or kidnapping or who has a family member who is a victim.

g. **G.L. c. 149, §148C – Earned Sick Time:** All employees in Massachusetts earn sick time. Employees earn 1 hour of sick time for every 40 hours they work. Employees can earn and use up to 40 hours per year and can rollover up to 40 hours. Employees begin earning sick time on their first day of work and may begin using it after 90 days of starting work. If an employer has 11 or more employees, sick time must be paid. Earned sick time can be used for:

1.Care for the employee's child, spouse, parent, or parent of a spouse, who is suffering from a physical or mental illness,

injury, or medical condition that requires home care, professional medical diagnosis or care, or preventative medical care;

2.Care for the employee's own physical or mental illness, injury, or medical condition that requires home care, professional medical diagnosis or care, or preventative medical care;

3.Attend a routine medical appointment or a routine medical appointment for the employee's child, spouse, parent, or parent of spouse;

4.Address the psychological, physical or legal effects of domestic violence; or

5.Travel to and from an appointment, a pharmacy, or other location related to the purpose for which the time was taken.

13. Is there a state law governing drug-testing?

No, Massachusetts does not have a state law governing drug-testing, but Massachusetts courts have ruled that drug testing can involve a significant invasion of privacy. The leading case on the issue is Webster v. Motorola, Inc., 418 Mass. 425 (1994). Testing should be done through the least-intrusive testing methods available which guarantee privacy and accuracy. To pass muster, the employer should be able to demonstrate a legitimate business purpose for drug testing its employees, such as operation of heavy machinery or because an employee must operate a motor vehicle as part of his or her job.

14. Is there a medical marijuana statute?

a. Yes, An Act for the Humanitarian Medical Use of Marijuana (Medical Marijuana Act), Chapter 369 of the Acts of 2012, went into effect on January 1, 2013. The Medical Marijuana Act allows a qualifying patient or a personal caregiver to possess no more marijuana than is necessary for the patient's personal, medical use, not exceeding the amount necessary for a sixty-day supply (10 ounces). The Medical Marijuana Act explicitly states that "nothing in this law requires any accommodation of any on-site medical use of marijuana in any place of employment"

b. The Regulation and Taxation of Marijuana Act (Marijuana Act), went into effect on December 15, 2016. It allows adults 21 years of age and older to possess up to one ounce of marijuana in public and up to 10 ounces at home for recreational purposes and to grow certain amounts of marijuana at home. The Marijuana Act explicitly states "Employment. This chapter shall not require an employer to permit or accommodate conduct otherwise allowed by this chapter in the workplace and shall not affect the authority of employers to enact and enforce workplace policies restricting the consumption of marijuana by employees."

c. As of the date of this compendium, the issue of whether an employer may terminate an employee for failing a drug test as a result of lawful use of medical marijuana outside the workplace to treat a disease is pending before the Massachusetts Supreme Judicial Court in the matter of Christina Barbuto v. Advantage Sales and Marketing LLC, et. al. (SJC-12226). The Court's decision will determine the future of the law in Massachusetts.

15. Is there trade secret / confidential information protection for employers?

Where there is no express contract of an employee not to use or disclose confidential information or trade secrets entrusted to him/her during employment, an employee may carry away and use general skill and knowledge acquired during the course of employment (i.e., general business practices, methodologies and names of customers retained by memory), but is enjoined from using or disclosing confidential information, trade secrets or written customer lists. Jet Spray Cooler, Inc. v. Crampton, 361 Mass. 835, 839–840, 282, citing New England Overall Co. v. Woltmann, 343 Mass. 69, 75 (1961); Augat, Inc. v. Aegis, Inc., 409 Mass. 165, 172 (1991).

16. Is there any law related to employee's privacy rights?

a. G.L. c. 214, §1B provides that, "A person shall have a right against unreasonable, substantial or serious interference with his privacy. The superior court shall have jurisdiction in equity to enforce such right and in connection therewith to award damages." In applying G.L. c. 214, §1B in context of the employment relationship, courts balance the legitimacy of the employer's need to obtain personal information against the seriousness of intrusion into an employee's privacy. Branyan v. Southwest Airlines Co., 105 F. Supp. 3d 120 (D. Mass. 2015).

b. Statutes Related to an Employee's Privacy

1. **G.L. c. 151B, §§ 4(9A), 16** – **Unlawful Practices:** Employers are expressly prohibited from making pre-employment inquiries into whether a prospective employee has been treated for mental illness or drug or alcohol dependency.

2.**G.L. c. 149, § 19B** – **Lie Detector Tests; Use as A Condition of Employment:** Prohibits employers from requesting or requiring their employees or prospective employees to take any form of lie detector test, and further prohibits any

retaliatory action against employees for asserting their rights secured by the statute. The statute also requires all employers to notify employees and prospective employees that it is unlawful to ask them to take a lie detector test.

3.**G.L. c. 149, 52C** – **Personnel Records Statute:** Requires an employer to notify an employee within 10 days of the employer placing in the employee's personnel record any information to the extent the information "is, has been used or may be used, to negatively affect the employee's qualification for employment, promotion, transfer, additional compensation or the possibility that the employee will be subject to disciplinary action." The statute includes a broad definition of personnel record.

17. Is there any law restricting arbitration in the employment context?

a. The Massachusetts Arbitration Act recognizes arbitration clauses. Other than an exception for collective bargaining agreements, the MAA does not explicitly restrict its application to employment matters. *See* G.L. c. 251, §§ 1-19.

b. Massachusetts recognizes as a condition of employment the use of arbitration agreements for statutory discrimination claims, including G.L. c. 151B, but only if the "agreement is stated in clear and unmistakable terms." Warfield v. Beth Israel Deaconess Med. Ctr., Inc., 454 Mass. 390 (2009)

18. Is there any law governing weapons in the employment context?

None.

MICHIGAN

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1. Is the state generally an employment-at-will state?

Yes.

2. Are there any statutory exceptions to the employment-at-will doctrine?

An employer may not terminate or threaten to terminate an at-will employee in connection with that employee's reporting or intent to report a suspected or actual violation of law (past or present, but not future) under the Michigan Whistleblower's Protection Act MCL 15.362, unless the employee knows that the report is false.

An employer also may not terminate an at-will employee due to that employee filing a complaint under the Michigan Occupational Safety and Health Act. MCL 408.1065.

An at-will employee may not be terminated in retaliation for filing a claim for benefits under the Michigan Worker's Disability Act, MCL 418.301(13), and any employer found to be consistently dismissing employees to avoid obligations created by the Act is guilty of a misdemeanor. MCL 418.125.

In addition to the protection from discrimination based upon protected characteristics provided by the Michigan Elliott-Larsen Civil Rights Act, the Act states that an employee may not be terminated for his or her opposition to a violation of the Act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act. MCL 37.2701.

3. Are there any public policy exceptions to the employment-at-will doctrine?

If an employee can prove that the employer's policies, words, or actions gave him legitimate expectations of "just-cause" employment then the employee could win a wrongful discharge claim. The leading case is *Toussaint v Blue Cross & Blue Shield*, 408 Mich 579; 292 NW2d 880 (1980).

4. Is there any law related to the hiring process?

Any employer has the right to hire anyone and follow any hiring procedures they wish to follow. The exception is that they may not fail to hire someone for reasons protected by discrimination statutes or adopt a hiring process that has the purpose or effect of denying employment to people based on a protected characteristic. The Elliott-Larsen Civil Rights Act, MCL 37.2101 et seq., prohibits help-wanted ads which indicates a preference, or are targeted at, any age group or specific characteristics (ex. height and weight).

Under Michigan law, employers are expressly prohibited from making pre-employment inquiries regarding race, color, religion, sex, or national origin, MCL 37.2206, unless the employer can establish that such inquiries are addressed to a bona fide occupational qualification. MCL 37.2208.

a. Immigration

Under federal law, it is unlawful for an employer to knowingly hire an alien unauthorized to work in the United States. 8 USC 1324a(a)(1)(A).

b. Recruitment/Advertisement

It is prohibited under federal law to advertise for a job opening which shows any preference by the employer as to the

age of the potential employee. 29 USC 623(e). It is unlawful in Michigan to fail to hire or recruit a candidate on the basis of religion, race, color, national origin, age, sex, height, weight, or marital status. MCL 37.2202(a), MCL 37.2208.

c. Applications

Refusal to consider walk-in applications may give rise to an inference of unlawful discrimination if the employer is actively recruiting and there is an absence of racial neutrality. *See Furnco Constr Corp v Waters*, 438 US 567, 569-72 (1978). Pre-employment inquiries which may disproportionately screen out a protected class are prohibited unless the employer can demonstrate the business necessity of the requirements or inquiries. For instance, the US Supreme Court has held that height and weight requirements must be reasonably necessary to a job to be a criteria for employment or an inquiry in an application. *See Dothard v Rawlinson,* 433 US 321, 330-32 (1977). Requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment, which may only be valid if there are work-related reasons for the rule. *See EEOC Guidelines on Discrimination Because of National Origin,* 29 CFR 1606.7 ("Speak-English-only rules").

Unless shown to be an absolute business necessity, an employer may not ask about an applicant's age (other than to determine whether of legal working age), arrests which did not result in conviction, birthplace, parents' birthplace, year of enrollment or graduation from elementary, middle, or high school, genetic information, height, weight, marital status, children or lack thereof, ancestry or national origin, desire to reproduce, race or color, religion or creed, sexual orientation or identity, or gender. These questions can be used as evidence of discrimination. *See generally* Jenny Che, "10 Questions Employers Can't Ask You In A Job Interview," *huffingtonpost.com*, 4/9/15. It is also prohibited for an employer to require a photograph of the applicant prior to hire. *See* State of Michigan Pre-Employment Inquiry Guide,

http://www.michigan.gov/documents/mdcr/Preemploymentguide62012_388403_7.pdf.

d. Background

Michigan employers are immune by statute from any civil liability that could arise for disclosing information documented in the employee's personnel file to a prospective employer, as long as the disclosure was made in good faith. MCL 423.452. Any prospective employers seeking to review an applicant's former personnel file should know that the contents of the file and the manner in which its contents may be used are subject to the Bullard-Plawecki Employee Right to Know Act, MCL 423.501, et seq. The Bullard-Plawecki Act permits employees to review their file upon written request up to twice a year. MCL 423.503. The act also imposes notice requirements and limitations on an employer's release to third parties of an employee's disciplinary history. MCL 423.506(1), MCL 423.507.

Under the Elliott-Larsen Civil Rights Act an employer must not, in connection with an application for employment or with the terms, conditions, or privileges of employment, "request, make, or maintain a record of information regarding a misdemeanor arrest, detention, or disposition where a conviction did not result … This section does not apply to information relative to a felony charge before conviction or dismissal." MCL 37.2205a(1).

The Internet Privacy Protection Act, MCL 37.271, et seq., 2012 PA 478, provides that an employer may not do the following with regard to applicants:

- Request an applicant to grant access to, allow observation of, or disclose information that allows access to or observation of the applicant's personal Internet account.
- Discharge, discipline, or fail to hire an applicant for failure to grant access to, allow observation of, or disclose information that allows access to or observation of the applicant's personal Internet account.

MCL 37.273. An applicant who is the subject of a violation of the act may bring a civil action to enjoin a violation of MCL 37.273 and may recover not more than $1,000 in damages plus reasonable attorney fees and court costs. MCL 37.278(2). Under this statute, a person seeking relief shall make a written demand for not more than $1,000 at least 60 days before pursuing civil action.

e. Credit history

Employers are permitted to request a consumer credit report to help evaluate the character, general reputation, personal characteristics, or mode of living of an applicant under the Fair Credit Reporting Act. 15 USC 1681 et seq, *Rasor v Retail Credit Co,* 87 Wash 2d 516, 554 P2d 1041(1976).

f. Medical history

The Americans with Disabilities Act prohibits a medical examination prior to an offer of employment. 42 USC 12112(d)(2)(A). Employers may not inquire as to an applicant's physical or mental condition before making a

conditional offer of employment, but they may make pre-employment inquiries into the ability of an applicant to perform job-related functions. 42 USC 12112(d)(2)(B). After the employer extends a conditional job offer for the new position, it may ask an individual disability-related questions or require a medical examination as long as it does so for all entering employees in the same job category. If an employer withdraws an offer based on medical information, it must show the reason for doing so was job-related and consistent with business necessity. *See EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA),* EEOC Notice No. 915.002, (July 27, 2000), .

https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm

g. Employment history

A prospective employer is allowed to inquire about an applicant's employment history. Previous employers are immune from civil liability for disclosing in good faith to the employee or prospective employer information documented in an applicant's personnel file. MCL 423.452.

State agencies are not able to inquire about an applicant's current or previous salaries before making a conditional job offer. State agencies are also not able to ask an applicant's current or prior employer to ascertain this information. E.D. 2019-10.

h. Notification to unsuccessful applicants

Michigan law does not currently address this topic.

i. Offers of employment

The Michigan unemployment insurance agency shall notify the agency in writing of the name of any employee who refuses any bona fide offer of reasonable employment. Upon notification to the agency, the agency shall notify the carrier who shall terminate the benefits of the employee pursuant to subsection (7)(a). MCL § 418.401(8) (subsection (7)(a) considers an employee who refuses a bona fide offer of reasonable employment without good and reasonable cause to have voluntarily removed him or herself from the work force and no longer entitled to wage loss benefits during the period of refusal.

5. Does the state recognize implied employment contracts under employment handbooks, policies, or practices?

They can technically exist but are rare and easily modified. When an implied-in-fact employment contract of indefinite duration provides for dismissal for cause only, that contract may be modified and an at-will relationship created by the dissemination of the new at-will policy statement in a handbook or otherwise, Ledl v Quik Pik Food Stores, Inc, 133 Mich App 583; 349 NW2d 529 (1984), provided that reasonable notice of the change is uniformly given to all affected employees in a fair manner. Employers can inform and make their employees aware that personnel policies are subject to unilateral changes by the employer.

Generally, and subject to a public policy exception prohibiting the discharge, discipline, or other adverse treatment of employees who act in accordance with a statutory right or duty, (MCL 37.2701 (Elliott-Larsen Civil Rights Act; MCL 37.1602 (Handicappers' Civil Rights Act); MCL 408.1065 (Occupational Safety and Health Act); MCL 15.362 (The Whistleblowers' Protection Act), either party to an employment agreement for an indefinite term may terminate it at any time for any or no reason. Suchodolski v Michigan Consol Gas Co, 412 Mich. 692, 694-95; 316 NW2d 710 (1982).

6. Does the state have a right to work law or other labor / management laws?

Yes. Michigan is a right-to-work state as of March 28, 2013, *See, e.g.* MCL 423.8, 423.14, 423.15, 423.17. Employees may opt-out of paying the costs of union representation. Collective bargaining agreements that became effective or are extended or renewed after March 28, 2013 are covered.

7. What tort claims are recognized in the employment context?

Michigan's Worker's Disability Compensation Act provides that it shall be an exclusive remedy for all work-related injuries or occupational disease. However, the Act goes on to say that an exception to this rule is given in the case of intentional torts. MCL 418.131(1).

a. Intentional Infliction of Emotional Distress

As an intentional tort, IIED falls outside the scope of the Michigan Worker's Disability Compensation Act, and is recognized as a tort claim, *see Teadt v. Lutheran Church Missouri Synod,* 237 Mich App 567, 582; 603 NW2d 816

(1999). Employers must exercise caution when investigating employee conduct as claims of IIED may accompany claims of invasion of privacy.

b. Negligent Infliction of Emotional Distress

In cases where the intentional tort exception has been recognized, the tort must be a true intentional tort. A true intentional tort is the formation by the employer of a specific intention to cause an injury or death, as opposed to mere negligence or even gross negligence. *Eide v Kelsey-Hayes Co,* 154 Mich App 142; 397 NW2d 532 (1986), *aff'd in part and rev'd in part on other grounds,* 431 Mich 26; 427 NW2d 488 (1988). *See also concurring and dissenting opinion in Meyerhoff v Turner Constr Co*, 202 Mich App 499, 509-11; 509 NW2d 847 (1993)(To the extent there is an employment relationship, plaintiffs' tort claims of negligent infliction of emotional distress would be barred by the exclusive remedy provision of the Workers' Disability Compensation Act, MCL 418.131).

c. Harassment/Assault/Battery

Employers must use due care in the hiring and retention process to ensure the avoidance of employing an individual with a documented history of violence or who shows a propensity toward violent behavior if that individual will be put in a situation in which they might harm another person. *Hersh v Kentfield Builders, Inc.*, 385 Mich 410, 412-13; 189 NW2d 286 (1971).

d. Invasion of Privacy

Employers must exercise caution in the hiring process as well as in monitoring employee behavior. Employers may not ask for access to an employee's or employee applicant's personal internet account as this would be a violation of the Internet Privacy Protection Act, MCL 37.271 et seq. Several common law limitations to employee surveillance also exist. Dissemination of performance evaluations should also be avoided due to privacy concerns.

e. Fraud

If an employment relationship has been severed, providing references to the former employee's prospective employer is a delicate process. Providing a false one-sided account of that person's employment may result in liability for fraud or negligent misrepresentation. *See, e.g. Kadlec Med Ctr v Lakeview Anesthesia Assocs*, 527 F3d 412, 419-20 (5th Cir, 2008); *cert denied,* 555 US 1046; 129 S Ct 631 (2008).

8. Is there a common law or statutory prohibition against discrimination / hostile work environment?

The Elliott-Larsen Civil Rights Act (ELCRA) prohibits discrimination on the basis of religion, race, color, national origin, age, sex, height, weight, or marital status. MCL 37.2202. Pregnancy discrimination has been held to be included within the meaning of sex discrimination. Michigan Dep't of Civil Rights ex rel Jones v Michigan Dep't of Civil Serv, 101 Mich App 295, 304; 301 NW2d 12 (1980)(Pregnancy exclusion is not a sex neutral classification; pregnancy is a condition unique to women; therefore, any distinctions drawn on the basis of this feature works to deny women valuable rights solely on account of their sex). The ELCRA was amended, effective December 22, 2009, to specifically provide that employers may not "[t]reat an individual affected by pregnancy, childbirth, or a related medical condition differently for any employment-related purpose from another individual who is not so affected but similar in ability or inability to work, without regard to the source of any condition affecting the other individual's ability or inability to work." MCL 37.2202(1)(d).

A charge of discrimination may be filed with the Michigan Department of Civil Rights for violation of ELCRA, MCL 37.2602(c). Administrative options need not be exhausted before bringing civil suit, see MCL 37.2803. Plaintiffs have a right to a jury trial in a civil suit.

Relief: Reinstatement, back and front pay, damages for mental and emotional distress, and reasonable attorney's fees.

A similar cause of action exists under the Persons with Disabilities Civil Rights Act, MCL 37.1101, et seq. The Persons with Disabilities Civil Rights Act prohibits employers with one or more employees from discriminating against an applicant or employee because that individual has a disability or because of genetic information that is unrelated to his or her ability to do a particular job with or without an accommodation. MCL 37.1202(1). The act also mandates that an employer accommodate a person with a disability as long as the accommodation does not impose an undue hardship. A person with a disability may file a cause of action only if they notified their employer of a need for accommodation through a writing within 182 days of the disabled person's discovery of a need for accommodation. MCL 37.1210(18). The PDCRA contains provisions prohibiting retaliation for opposing violations of the act. MCL 37.1210.

a. Race and Color

The Elliott-Larsen Civil Rights Act (ELCRA) prohibits discrimination on the basis of race and color. MCL 37.2202. A charge of discrimination may be filed with the Michigan Department of Civil Rights. Administrative options need not be exhausted before bringing civil suit. Plaintiffs have a right to a jury trial in a civil suit.

Relief: Reinstatement, back and front pay, damages for mental and emotional distress, and reasonable attorney's fees.

b. Ethnic/National Origin

The Elliott-Larsen Civil Rights Act (ELCRA) prohibits discrimination on the basis of national origin. MCL 37.2202. A charge of discrimination may be filed with the Michigan Department of Civil Rights. Administrative options need not be exhausted before bringing civil suit. Plaintiffs have a right to a jury trial in a civil suit.

Relief: Reinstatement, back and front pay, damages for mental and emotional distress, and reasonable attorney's fees.

c. Gender

The Elliott-Larsen Civil Rights Act (ELCRA) prohibits discrimination on the basis of sex. MCL 37.2202. Pregnancy discrimination has been held to be included within the meaning of sex discrimination. Michigan Dep't of Civil Rights ex rel Jones v Michigan Dep't of Civil Serv, 101 Mich App 295, 304; 301 NW2d 12 (1980). The ELCRA was amended, effective December 22, 2009, to specifically provide that employers may not "[t]reat an individual affected by pregnancy, childbirth, or a related medical condition differently for any employment-related purpose from another individual who is not so affected but similar in ability or inability to work, without regard to the source of any condition affecting the other individual's ability or inability to work." A charge of discrimination may be filed with the Michigan Department of Civil Rights. Administrative options need not be exhausted before bringing civil suit. Plaintiffs have a right to a jury trial in a civil suit.

Relief: Reinstatement, back and front pay, damages for mental and emotional distress, and reasonable attorney's fees.

d. Age

The Elliott-Larsen Civil Rights Act (ELCRA) prohibits discrimination on the basis of age. MCL 37.2202. A charge of discrimination may be filed with the Michigan Department of Civil Rights. Administrative options need not be exhausted before bringing civil suit. Plaintiffs have a right to a jury trial in a civil suit.

Relief: Reinstatement, back and front pay, damages for mental and emotional distress, and reasonable attorney's fees.

e. Religion

The Elliott-Larsen Civil Rights Act (ELCRA) prohibits discrimination on the basis of religion. MCL 37.2202. A charge of discrimination may be filed with the Michigan Department of Civil Rights. Administrative options need not be exhausted before bringing civil suit. Plaintiffs have a right to a jury trial in a civil suit.

Relief: Reinstatement, back and front pay, damages for mental and emotional distress, and reasonable attorney's fees.

f. Veteran / military status

No statute or case law in Michigan specifies military veterans as a protected class. Federal and state law both provide some legal protections and protection from discrimination.

Veterans receive these legal protections under certain conditions: right to terminate property, auto, and self-storage leases; six percent (6 %) interest rate cap; right to terminate cell phone contracts, protection against eviction, protection against foreclosure, utility shut-off protection, protection against repossession, protection from wage garnishment, stay of civil court proceedings, protection from default judgment, protection from discrimination; reinstatement of private health insurance, automobile insurance protection, and professional liability protection. See Other Legal Protections and Rights Provided by State And Federal Law, by Michigan Attorney General Bill Schuette, at: http://www.michigan.gov/ag/0,4534,7-164-65798-289652--00,00.html, citing to the Service Members Civil Relief Act (SCRA), now at 50 USC 3901, et seq., MCL 600.3185, 600.3285, 460.9c, 445.1011, 484.1901, 32.517, 570.521 et seq., and 500.2116a.

g. Disability/ Genetic Information

The People with Disabilities Civil Rights Act (PDCRA) prohibits employers from discriminating against an applicant or employee because that individual has a disability, or because of genetic information that is unrelated to his or her ability to do a particular job with or without an accommodation. MCL 37.1202(1). The act also mandates that an employer accommodate a person with a disability as long as the accommodation does not impose an undue hardship. The PDCRA contains provisions prohibiting retaliation for opposing violations of the act. MCL 37.1210.

The Genetic Information Nondiscrimination Act of 2008 prohibits discrimination based upon genetic information. 42 USC 2000ff, et seq.

h. Sexual Orientation

The Michigan Civil Rights Commission adopted interpretive statement 2018-1 in May of 2018 regarding the meaning of "sex" in the Elliott-Larsen civil rights act of 1976 to include discrimination because of sexual orientation and gender identity. The interpretive statement was adopted to help the Michigan Department of Civil Rights gain the authority to accept complaints of discrimination based on "gender identity" and "sexual orientation."

The EEOC interprets and enforces Title VII's prohibition of sex discrimination as forbidding any employment discrimination based on gender identity or sexual orientation. These protections apply regardless of any contrary state or local laws.

What You Should Know About EEOC and the Enforcement Protections for LGBT Workers, at:

https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm

State contracts, grants and loans cannot discriminate against sexual orientation and gender identity or expression as a term to a contractual agreement. E.D. 2019-09.

i. Sexual identity

The 6th Circuit has held that transgender persons are protected from gender stereotyping as a form of gender discrimination. Smith v City of Salem, 378 F3d 566, 572-75 (6th Cir 2004).

See above "h. sexual orientation."

j. Other – List

See above

9. Is there a common law or statutory prohibition of retaliation?

The Whistleblowers' Protection Act, MCL §15.362, states: An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.

Jury trial is available under the Michigan Court Rules by timely demanding a jury trial and paying the jury trial fee.

a. Discrimination Claims

MCL § 37.2701(a) of the Elliott-Larsen Civil Rights Act prohibits retaliation because of making a charge, filing a complaint, testifying, assisting, or participating in an investigation, proceeding, or hearing under the Act. Injunctive relief and damages are available under the Act, MCL § 37.2801. Attorney fees may be awarded under the Act, MCL § 37.2802.

b. Workers' Compensation Claims

MCL § 408.1065(1) of the Occupational Safety and Health Act prohibits discharging or discriminating against an employee because the employee filed a complaint or proceeding under the Act, or has testified or is about to testify in such a proceeding, or due to exercising a right under the Act on behalf of himself or herself or others. MCL § 418.301(13) contains a similar prohibition under the Worker's Disability Compensation Act. (Repealed). If a violation is found, all appropriate relief may be ordered, including rehiring, reinstatement, and back pay. MCL § 408.1065(2).

c. Military Service

Certain actions may not be taken against military service members under certain conditions: *e.g.* refusing to terminate a member's property and auto lease, charging interest above a certain rate, refusing to terminate a cell phone contract, eviction, foreclosure, shut-off utilities, repossession, wage garnishment, continuing civil court proceedings, taking a default judgment, discriminating, refusing to reinstate private health insurance. 50 USC § 4042 permits the award of attorney fees in a private lawsuit for enforcement. MCL § 445.1016 provides for the possibility of civil fines in addition to a lawsuit with respect to military vehicle leases. MCL § 484.1906 is similar with respect to cell phones and provides a $2,000 violation penalty. MCL § 600.3285 provides for civil fines as to foreclosure violations. MCL §

570.526 provides for reasonable attorney fees with respect to self-storage unit matters.

d. Political Activities

Political activity retaliation in the workplace is generally not well-protected in Michigan, although government employees are better off in this area than private sector employees.

e. Medical Leaves

The Family Medical Leave Act, 29 USC § 2601, et seq., provides eligible employees up to twelve weeks of unpaid leave to attend to serious health conditions. 29 USC § 2617 provides for civil actions and damages, including attorney fees for the aggrieved employee.

The Michigan Paid Medical Leave Act, MCL 408.961, et seq., requires employers to pay eligible employees for earned medical leave time. This Act is only applicable to employers who employ 50 or more individuals. *See generally Mandatory Paid Sick Leave: What's Required of Employers*, MICH. CHAMBER OF COM., https://www.michamber.com/paid-sick-leave-summary (last visited July 16, 2019).

f. Maternity/Paternity Leaves

These are covered by the Family Medical Leave Act, *see above.*

g. Whistle Blowing

The Whistleblowers Protection Act, MCL § 15.362, quoted at no. nine above, prohibits retaliation against whistleblowers. A person who alleges a violation of this act may bring a civil action for appropriate injunctive relief, or actual damages, or both within 90 days after the occurrence of the alleged violation of this act, MCL § 15.363. A whistleblower who recovers damages also recovers reasonable attorney fees, MCL § 15.363.

h. Safety Complaints

Workers may not be terminated for reporting safety complaints. MCL § 408.1065 (general employee whistleblower protection); MCL § 408.1031(2) (imminent danger whistleblower protection); MCL § 408.1029(10) (inspections).

i. Voting

Michigan has no specific law requiring time off to vote in an election.

j. Jury Duty/Court Attendance

An employer may not threaten to discharge, discharge, or discipline an employee for jury duty. MCL § 600.1348. Salary deductions may not be made for absence for jury duty, but the amount received for jury fees can be offset against the salary due. 29 CFR 541.602(b)(3).

k. Public Conduct Not Associated with Employment

The National Labor Relations Act provides some protection to covered employees for public conduct not associated with employment. The Michigan Internet Privacy Protection Act, MCL § 37.271, et seq., discussed *above and below,* protects all Michigan employees and employee applicants.

l. Private Conduct Not Associated with Employment

The Michigan Internet Privacy Protection Act, MCL § 37.271, et seq., discussed *above and below,* protects all Michigan employees and employee applicants. The Bullard-Plawecki Employee Right to Know Act generally prohibits an employer from gathering or keeping a record of an employee's non-employment associations, political activities, publications, or communications. MCL § 423.508.

m. Other

See above and *below.*

10. Is the state a deferral state for charges filed with the EEOC?

Yes.

11. Are there any state laws related to compensation, including wage and hour, paid time off, mandatory breaks, fringe benefits, allowable deductions, prevailing wage rates for public contracts, etc.?

a) **Wage and Hour**: The Workforce Opportunity Wage Act, MCL 408.411 *et seq.*, is the state's wage and hour law. MCL 408.414 prescribes the minimum wage (in 2017, $8.90 for hourly employees, $3.38 for tipped employees, and $7.57 for minors aged 16-17). If a tipped employee's tips do not equal or exceed the minimum hourly rate, the employer is responsible for any shortfall. MCL 408.414d(1)(b). MCL 408.414a prescribes overtime requirements. MCL 408.419 governs violations of the acts and recovery of liquidated damages, costs, and reasonable attorney fees.

b) **Mandatory Breaks**: Minors to receive mandatory breaks while working. A minor who is employed for more than 5 hours continuously shall receive a mandatory 30-minute break for a meal and rest period. MCL 409.112. Violations of the state's laws regarding the employment of minors is governed by MCL 409.122. There is no similar requirement of mandatory breaks for adults.

There is no requirement for employers to provide paid or unpaid vacations, but if an employer promises paid vacation time in writing, this is binding.

c) **Fringe Benefits and Allowable Deductions**: The Wages and Fringe Benefits Act, MCL 408.471 *et seq.*, governs fringe benefits and allowable deductions from an employee's pay in Michigan. Violations and recovery for those violations are covered in MCL 408.484, 485, 486, and 488.

d) **Prevailing Wage Rates for Public Contracts**: The Michigan Prevailing Wages on State Projects Act, MCL 408.551 *et seq.*, requires the payment of prevailing wage rates to all laborers and mechanics on state government construction projects. Failure to pay the prevailing wage is a misdemeanor under MCL 408.557.

See supra.

12. Is there a state statute governing paid or unpaid leaves?

Michigan does not have much state legislation governing paid or unpaid leave, except the following:

a) **Jury Leave**: An employer is not required to pay an employee for responding to a jury summons or serving on a jury. However, state law makes it a misdemeanor for an employer to discipline or discharge an employee because of responding to a jury summons or serving on a jury. MCL 600.1348.

b) **Military Leave**: MCL 32.271 *et seq* mandates permitted leave of absences for members of military or naval forces and re-employment after their service. The employee must apply for reinstatement within 45 to 90 days depending on duration of leave. MCL 32.273(1).

13. Is there a state law governing drug-testing?

There is no state statute on the regulation of employment drug-testing.

14. Is there a medical marijuana statute?

The Michigan Medical Marihuana Act, MCL 333.26421 *et seq.*, contains provisions relating to medical marihuana usage and employment. However, an employer is *not* required "to accommodate the ingestion of marihuana in any workplace or any employee working while under the influence of marihuana." MCL 333.26427.

The Sixth Circuit Court of Appeals ruled that the Michigan Medical Marihuana Act does not regulate private employment. *Casias v Wal-Mart Stores, Inc*, 695 F3d 428, 431 (CA 6, 2012). There the Plaintiff complied with the statutory requirements but was terminated after he failed a drug test and did not comply with his employer's "zero tolerance" drug policy. The Court affirmed the lower court's dismissal of the action.

15. Is there trade secret / confidential information protection for employers?

Michigan adopted the Uniform Trade Secrets Act with minimal modifications. MCL 445.1901 *et seq.* The statute protects trade secrets (defined as documents, formulas, etc. that have independent economic value by virtue of being secret and are subject to reasonable efforts to maintain secrecy) from misappropriation. The Court can enjoin misappropriation and/or award damages for actual loss, unjust enrichment, or assess a reasonable royalty. MCL 445.1904. Attorney's fees are recoverable in the event of willful or malicious misappropriation. MCL 445.1905.

16. Is there any law related to employee's privacy rights?

The following are state statutes regarding an employee's privacy rights:

a) **Social Media**. The Michigan Internet Privacy Protection Act, MCL 37.271 *et seq.*, prohibits certain actions of an employer regarding an employee's "personal internet account." Generally employers are prohibited from asking for access to employees' personal media accounts. Penalties for violations and recovery for damages, attorney's fees, and costs are governed by MCL 37.278.

b) **Polygraph Tests.** The Polygraph Protection Act of 1981, MCL 37.201 *et seq.*, provides limits for an employer's use of lie-detector tests. Generally Employers may not require a test as a condition of employment, a change in status in employment or a condition of a benefit or privilege in employment. Penalties for violations and recovery for damages, attorney's fees, and costs are governed by MCL 37.207 and 37.208.

c) **Social Security Number.** The Michigan's Social Security Number Privacy Act, MCL 445.81 *et seq.*, mandates that employers comply with a number of restrictions regarding the use of an employee's social security number, including not disclosing more than four sequential digits. Penalties for violations and recovery for damages, attorney's fees, and costs are governed by MCL 445.86.

d) **Personnel Records**. The Bullard-Plawecki Employee Right to Know Act (Bullard-Plawecki Act), MCL 423.501 *et seq.*, establishes an employee's right to access his/her personnel records. Penalties for violations and recovery of damages, attorney's fees, and costs are governed by MCL 423.511.

17. Is there any law restricting arbitration in the employment context?

Michigan adopted the Uniform Arbitration Act (UAA), MCL 691.1681 *et seq.*, which provides for the enforcement of arbitration agreements and the procedures for arbitration. Arbitration agreements are enforceable unless grounds exist at law or in equity to revoke the same. If an employee expressly agrees to arbitrate his or her employment dispute (including statutory claims) Courts will generally uphold the agreement. *Rembert v Ryan's Family Steak Houses, Inc.*, 235 Mich App 118; 596 NW2d 208 (1999).

18. Is there any law governing weapons in the employment context?

Michigan's concealed carry law is governed by MCL 28.421 *et seq*. Pursuant to MCL 28.425n, an employer may prhoibit an employee from carrying a concealed pistol in the course of his/her employment with the employer.

19. Miscellaneous employment or labor laws not discussed above?

As of March 2013, Michigan became a "right to work" state in that an employer may not condition employment or continued employment on membership in or payment of dues or fees to a labor organization. MCL 423.14.

MINNESOTA

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1. Is the state generally an employment-at-will state?

Employment-at-will is not codified in Minnesota. However, it is presumed under the common law. See e.g. *Gunderson v. Alliance of Computer Professionals, Inc.*, 628 N.W.2d 173, 181 (Minn. Ct. App. 2001) ("In the absence of an express or implied agreement to the contrary or sufficient consideration in addition to the services to be rendered, Minnesota law presumes that employment for an indefinite term is at will.") (citation omitted).

2. Are there any statutory exceptions to the employment-at-will doctrine?

There is no per se prohibition of employment-at-will in Minnesota, with the possible exception of employment of Veterans by public entities. Veterans who were separated under honorable conditions from any branch of the armed forces of the United States and who have met identified active duty requirements or have been separated by reason of disability incurred while serving on active duty, may not, after any initial hiring probationary period expires, be removed from the position or employment with a county, home rule charter or statutory city, town, school district, or any other political subdivision in the state, except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing. Minn. Stat. §§ 197.447 ("Veteran" defined) and 197.46 (Veteran's Preference Act).

3. Are there any public policy exceptions to the employment-at-will doctrine?

There is a limited public policy exception. *See Phipps v. Clark Oil & Refining Co.*, 396 N.W.2d 588 (Minn. Ct. App. 1986) (recognizing a common law cause of action if the employee is discharged for refusing to participate in an activity that the employee, in good faith, believes violates any legislative or judicially recognized public policy, in this case, the Clean Air Act). As the *Phipps* court related, "An employer's authority over an employee does not include the right to demand that the employee commit a criminal act." *Id*. at 592.

4. Is there any law related to the hiring process?

With respect to recruitment of employees to work in the food industry, Minnesota requires that employers provide such employees with a written disclosure of the terms and conditions of employment at the time it recruits the person to relocate to work in the food processing industry. Minn. Stat. § 181.635, subd. 2. This requirement does not apply to employees that are exempt within the meaning of the federal Fair Labor Standards Act. *Id*.

Minnesota has passed "ban the box" legislation, which prohibits public and private employers to inquire into or consider or require disclosure of criminal history of an applicant for employment until the applicant has been selected for an interview or, if there is no interview, before a conditional offer of employment is made to the applicant. Minn. Stat. § 364.021(a). The requirement does not apply to employers who have a statutory duty to conduct a criminal history background check or otherwise to take into consideration a potential employee's criminal history during the hiring process. Minn. Stat. § 364.021(c).

Concerning public employment decisions, a government agency may not rely on criminal records of arrest not followed by conviction, expunged convictions, or misdemeanor convictions where a jail sentence may not be imposed. Minn. Stat. § 364.04. In addition, an individual may not be disqualified from public employment based on a prior criminal conviction, unless that conviction relates to the type of employment sought. Minn. Stat. § 363.03, subd. 2.

Minnesota has its own version of the Fair Credit Reporting Act. See Minn. Stat. § 13C.001, et seq. If an employer intends to obtain or cause to be prepared a consumer report on an individual for employment purposes, the employer must clearly and accurately disclose to the employee or prospective employee that such a report may be obtained or caused to be prepared.

Minn. Stat. § 13C.02, subd. 1. Such disclosure must be in writing and provided the employee or prospective employee before the report is obtained or caused to be prepared. If the employer provides an application, the disclosure must be included in or accompany the application. The disclosure must also include a box that the subject of the report can sign to receive a copy of the consumer report. If the subject of the report checks the box, the employer must request that the person preparing the report provide a copy to the employee/prospective employee. The employee/prospective employee must also be sent a copy of the report by the person preparing it within 24 hours of providing it to the employer. The report must also include a statement of the employee/prospective employee's right to dispute and correct any errors, and the procedures available under 15 USC §§ 1681 to 1681t. Remedies for violation can include damages, costs and disbursements, attorney's fees, and equitable relief as determined by the court.

Minnesota Statutes Section 363A.01, et. seq., the Minnesota Human Rights Act ("MHRA"), prohibits, among other things, disability discrimination. Minn. Stat. § 363A.08, subd. 1. It is unlawful to inquire into the employee's medical history in connection with an employee's application for employment or job interview. *See Id*. at 363A.08, subd. 2.

Minnesota Statutes Section 181.55 requires that when a contract is entered into between an employer and an employee for work performed in Minnesota, or for work to be performed in another state for an employer located in Minnesota, the employer is required to give the employee a written and signed agreement of hire, which shall clearly and plainly state:

(1) the date on which the agreement was entered into;

(2) the date on which the services of the employee are to begin;

(3) the rate of pay per unit of time, or of commission, or by the piece, so that wages due may be readily computed;

(4) the number of hours a day which shall constitute a regular day's work, and whether or not additional hours the employee is required to work shall constitute overtime and be paid for, and, if so, the rate of pay for overtime work; and

(5) a statement of any special responsibility undertaken by the employee, not forbidden by law, which, if not properly performed by the employee, will entitle the employer to make deductions from the wages of the employee, and the terms upon which such deductions may be made.

Fail to provide the required written agreement for hire results in a shifting of the burden of proof, where the terms are disputed, to the employer to establish the terms of the verbal agreement. Minn. Stat. § 181.56.

5. Does the state recognize implied employee contracts under employment handbooks, policies, or practices?

If not drafted carefully, handbook provisions can be considered terms of contract. *See e.g. Pine River State Bank v. Mettille*, 333 N.W.2d 622 (Minn. 1983). See *also Lee v. Fresenius Medical Care, Inc.*, 741 N.W.2d 117 (Minn. 2007) (holding handbook constituted an enforceable contract with respect to paid time off; further holding that, under handbook terms, employee was not entitled to payment of accrued PTO upon termination, as manual precluded such payment where termination was for misconduct). The terms of an employee handbook constitute a contractual offer if the terms are definite in form and communicated to the employee through dissemination of the handbook. *Pine River*, 333 N.W.2d at 626. Once received, "[t]he employee's retention of employment constitutes acceptance of the offer . . . [B]y continuing to stay on the job, although free to leave, the employee supplies the necessary consideration for the offer." *Id*. at 626-27.

In an effort to avoid the *Pine River* scenario, it is fairly standard for employers to include language at the beginning of a handbook that nothing contained therein is intended or to be construed as a term of contract and that the employer retains the right to modify or terminate policies or benefits at its discretion and without notice to the extent permitted under the law.

6. Does the state have a right to work law or other labor / management laws?

Minnesota is not a right-to-work state. *See generally* Minn. Stat. §§179.01 *et seq.*, Minnesota Public Employment Labor Relations Act ("PELRA").

PELRA, provides procedures and protections regarding the employment of public employees as defined in the Act. See Minn. Stat. § 179.01, et seq. For example, public employees have the right to organize, meet, negotiate, and engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Minn. Sta. 179A.06, subdivisions 2, 5 and 7, respectively. Public employers are prohibited, among other things, from interfering, restraining, or coercing employees concerning the rights guaranteed under the Act, and from discriminating against employees in regard to hiring or tenure in an effort to encourage or discourage membership in an employee organization. Minn. Stat. § 179A.13, subd. 2 (1) and (3), respectively.

7. What tort claims are recognized in the employment context?

In addition to claims for discrimination under the MHRA (except when based on a bona fide occupational qualification, prohibiting discrimination in employment based upon race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, familial status, disability, sexual orientation and age), it is not unusual for employees to bring claims for intentional infliction of emotional distress and violation of Minnesota's Whistleblower Act Minn. Stat. § 181.932, subd.1). If the employee brings claims for discrimination or retaliation under the MHRA, then the Act is exclusive while the matter is pending. Minn. Stat. § 363A.04. In this case, the employee would have to have a separate factual basis and separate injuries or damages addressed by any other claim(s). *See e.g. Williams v. St. Paul Ramsey Medical Ctr., Inc.*, 551 N.W.2d 483, 485 (Minn. 1996) (MHRA exclusivity bars Whistleblower Act claim based upon the same facts and injury or damages). *See also Radcliffe v. Securian Financial Group, Inc.*, 906 F.Supp.2d 874, 896 (D.Minn. 2012) (applying Minnesota law and citing the MHRA exclusivity clause as an additional reason for dismissal of plaintiff's intentional infliction of emotional distress claim). *But see Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374 (Minn. 1990) (authorizing maintenance of sexual harassment action under the MHRA and parallel action for common law battery based upon the same facts because these claims involve different elements of proof and address different injuries).

A claim for intentional infliction of emotional distress is a common law claim. While damages, together with costs and disbursements are available, attorney's fees are typically not. In contrast, in addition to a civil action for damages, the Minnesota Whistleblower Act permits not only recovery of all damages permitted under law, but also costs and disbursements, reasonable attorney's fees, and injunctive and other equitable relief as determined by the court. Minn. Stat. § 181.935.

An employee has a right to a jury trial where the claim is a tort claim and the employee is seeking damages as opposed to equitable relief. *Abraham v. County of Hennepin*, 639 N.W.2d 342, 353 (Minn. 2002). A Minnesota Whistleblower Act claim is considered a tort claim; if the employee seeks only money damages, the employee is entitled to a jury trial. *Id*.

Under Minnesota law, a claim for interference with contractual relations may lie against a supervisor who acts outside the scope of his or her duties in causing termination of employment. *Nordling v. Northern States Power Co.*, 478 N.W.2d 498, 506-07 (Minn. 1991). The supervisor's actions must be predominantly motivated by malice and bad faith (personal ill-will, spite, hostility or deliberate intent to harm) and without legal justification.

8. Is there a common law or statutory prohibition against discrimination / hostile work environment?

The primary anti-discrimination/hostile work environment statute in Minnesota is the MHRA codified at Minnesota Statutes Sections 363A.01 et seq. However, there are others, including that prohibiting age discrimination, Minn. Stat. § 181.81 (prohibiting discrimination regarding hiring and terms of employment based upon the person being of an age less than 70, with certain exceptions), and that prohibiting wage discrimination based upon sex, Minn. Stat. § 181.67.

Jury trial is available under the MHRA. Minn. Stat. § 363A.33, subd. 6. Under Minnesota Statutes Section 363A.29, payment of compensatory damages up to three times actual damages sustained (back pay and front pay), damages for mental anguish or suffering, punitive damages up to $25,000, reinstatement, back pay, a civil fine to the state, and reasonable attorneys' fees may be awarded to the aggrieved party, together with other just and equitable relief.

For a section 181.81 claim for age discrimination, reinstatement or compensation for any period of unemployment, reasonable attorney's fees, costs and injunctive relief are available.

Minnesota also prohibits discrimination in the form of payment of wages to employees at a rate less than the rate the employer pays to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. Minn. Stat. § 181.67, subd. 1. Exceptions to this requirement include where such payment is made pursuant to a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or a differential based on any other factor other than sex. *Id*. For violation of this statute, an employee can receive up to one years' wages from the time the action is instituted, exemplary damages up to an equal amount (court's discretion), and reasonable attorney's fees and costs. Minn. Stat. § 181.68. An employer's violation of this Act is also a misdemeanor.

Minnesota also prohibits an employer from administering a genetic test or requesting, requiring, or collecting protected genetic information regarding a person as a condition of employment, or affecting the terms or conditions of employment or terminating the employment of any person based on protected genetic information. Minn. Stat. § 181.974, subd. 2. "Genetic test" for purposes of the statute "means the analysis of human DNA, RNA, chromosomes, proteins, or certain metabolites in order to detect disease-related genotypes or mutations. . . ." *Id*. at subd.1(a). Penalties for violation include up to three times the actual damages suffered due to the violation, punitive damages, reasonable costs and attorney fees, and injunctive or other equitable

relief as the court may deem appropriate. *Id.* at subd.3.

9. Is there a common law or statutory prohibition of retaliation?

The MHRA prohibits reprisal (defined as any form of intimidation, retaliation or harassment) for opposing a practice prohibited by the statute or filing a charge, testifying, assisting, or participating in any manner in an investigation, proceeding or hearing under the statute. Minn. Stat. § 363A.15. Please see section 8, above for rights and remedies.

Minnesota Statutes Section 176.82, subd. 1, prohibits an employer from discharging or threatening to discharge an employee for seeking workers' compensation benefits or in any manner intentionally obstructing an employee seeking workers' compensation benefits. The employee can bring a civil action for damages, and obtain costs and reasonable attorney's fees, in addition to punitive damages not to exceed three times the amount of any compensation benefit to which the employee is entitled.

Minnesota's equal pay act prohibits discrimination in the hire or tenure of employment, or any term of employment, on the basis that the employee has filed a complaint, has testified or about to testify, in a related investigation or proceeding, or criminal matter. Minn. Stat. §181.67, subd. 2.

Minnesota Statutes Section 181.932, subd. 1, also known as Minnesota's "Whistleblower Act," prohibits an employer from taking adverse discriminatory employment action against an employee because the employee in good faith, reports a violation, suspected violation, or planned violation of any federal or state law or common law or rule adopted pursuant to law to an employer or to any governmental body or law enforcement official. The Whistleblower act contains a remedy provision, which reads, "In addition to any remedies otherwise provided by law, an employee injured by a violation of section 181.932 may bring a civil action to recover any and all damages recoverable at law . . . ." Minn. Stat. § 181.935(a).

Minnesota's Occupational and Safety Health Act ("MNOSHA"), prohibits an employer from discharging or discriminating in any way against an employee who files a complaint or institutes or causes to be instituted any proceeding or inspection under the chapter or has testified or is about to testify in any such proceeding. Minn. Stat. § 182.654, subd. 9. The employee can file a complaint with the Minnesota Commissioner of Labor and Industry, which will undertake and investigation. If the Commissioner determines that discrimination occurred, the matter may be referred to an administrative proceeding where the employee may seek reinstatement, back pay, compensatory damages, costs, witness fees, and attorney's fees. Minn. Stat. § 182.669, subd. 1. Moreover, pursuant to Minnesota Statutes Section 182.654, subd. 11, an employer may not discriminate against an employee for a good faith refusal to perform assigned tasks if the employee has requested that the employer correct the hazardous conditions but the conditions remain uncorrected.

Minnesota Statutes Section 181.52 prohibits retaliation by any corporation, member of any firm, or any agent, officer, or employee of any of them, in the form of preventing any person from obtaining or holding any employment, or discharge, or procure or attempt to procure the discharge of, any person from employment, by reason of the person having engaged in a strike.

The new Minnesota Wage Theft Law prohibits an employer from retaliating against an employee asserting rights regarding wage theft, including, for example, filing a complaint with the Department of Labor and Industry or telling the employer of the employee's intention to file a complaint. Minn. Stat. § 177.45, subd. 6. In addition to other remedies provided under the law, an employer who violates subdivision 6 is liable for a civil penalty of not less than $700 nor more than $3,000 per violation. *Id*.

10. Is the state a deferral state for charges filed with the EEOC?

The Minnesota Department of Human Rights, and the Minneapolis (MN) Department of Civil Rights are recognized deferral agencies. 29 CFR § 1601.74. A charging party can dual file charges of discrimination with either of these entities and the EEOC.

11. Are there any state laws related to compensation, including wage and hour, paid time off, mandatory breaks, fringe benefits, allowable deductions, prevailing wage rates for public contracts, etc.?

Minnesota Statutes Chapter 181 governs a variety of employment-related topics affecting compensation and other matters, time for payment, type of payment, payments to minors, type of payment, assignment, and permitted (and unpermitted) deductions.

The Minnesota Fair Labor Standards Act, Minnesota Statutes Section 177.21, et seq., mandates state minimum wage requirements which can vary depending on the size of the employer, the age of the employee, and the type of employment establishment or the type of work performed. See generally Section 177.24. As of August 1, 2016, Large Employer's (gross sales $500,000 or higher) must pay a minimum of $9.50/hr. Employees of Small Employers (gross sales less than $500,000),

and employees younger than 20 years of age and in training (first 90 consecutive days of employment) must be paid a minimum of $7.75/hr. Employees of hotels, motels, lodging establishments and resorts, that are under contract that includes a food or lodging benefit, if working under authority of a summer work travel exchange program non-immigrant visa, are also to be paid $7.75/hr as of August 1, 2016.

Minnesota Statutes Sections 177.41 to 177.44 govern prevailing wages in contracts for state projects and state highway construction. Laborers, workers, and mechanics in projects financed in whole or part by state funds are to be paid wages comparable to that paid for similar work in the community as a whole. Minn. Stat. § 177.42.

Excepted from prevailing wage coverage in contracts for state projects and highway contracts are those laborers, workers and mechanics who process or manufacture materials or products or deliver materials or products by or for commercial establishments which have a fixed place of business from which they regularly supply processed or manufactured materials or products. Minn. Stat. § 177.43, subd. 2. Also excepted from prevailing wage requirements in contracts for state projects, but not highway projects in which the state is a party, are laborers or mechanics who deliver mineral aggregate such as sand, gravel or stone which is incorporated into the work under the contract by depositing the material substantially in place, directly or through spreaders, from the transporting vehicle. *Id*.; Minn. Stat. § 177.44, subd. 2. Failure to comply with prevailing wage requirements concerning contracts for state projects can result in the withholding of payment sufficient to satisfy the back wages assessed, together with the imposition of misdemeanor criminal penalties. Minn. Stat. § 177.43, subd. 5 (penalty) and subd. 6a (wage violations). Failure to comply with prevailing in highway projects where the state is a party, can result in the imposition of criminal penalties and fines. Minn. Stat. § 177.44, subd. 6.

Minnesota Statutes Section 177.253 requires that employers provide adequate time from work within each four consecutive hours to use the nearest convenient restroom. Each employee who works eight or more consecutive hours must be provided a reasonable time to eat a meal. Minnesota Rules 5200.0120, subp.4, provides that 30 minutes or more is a sufficient meal break.

Minnesota Statutes Section 181.939 requires that an employer provide an employee who is a nursing mother with reasonable unpaid break time each day to express breast milk for her infant child in a room or location in close proximity to the work area, shielded from view and free from intrusion, with an available electrical outlet, and other than a bathroom or toilet stall, where the employee can express her milk in privacy. The break time must, if possible, run concurrently with any break time already provided the employee.

Minnesota recently passed the Minnesota Wage Theft Law. All provisions, save those relating to criminal wage theft and sanction, go into effect July 1, 2019. The provisions for criminal wage theft and sanction go into effect on August 1, 2019. In summary, the law clarifies that employees have a substantive right to the payment of commissions and wages at the employee's rate or rates of pay or the rate or rates required by law, whichever is greater, in addition to the right to be paid wages or commissions earned at specific intervals on a regular payday. Minn. Stat.§ 181.101(a). Depending on the circumstances, failure to pay wages in the amount due and when due can result in criminal and civil penalties.

"The crime of "wage theft" occurs when an employer, with intent to defraud:

- Fails to pay an employee all wages, salary, gratuities, earnings or commissions at the employee's rate or rates of pay or at the rate or rates required by law, whichever is greater.
- Directly or indirectly causes any employee to give a receipt for wages for a greater amount than that actually paid to the employee for services rendered.
- Directly or indirectly demands or receives from any employee any rebate or refund from the wages owed the employee under contract of employment with the employer.
- Makes or attempts to make it appear in any manner that the wages paid to any employee were greater than the amount actually paid to the employee."
- Minnesota Department of Labor and Industry, Summary of Minnesota's New Wage Theft Law at p. 5, June 2019 (citing Minn. Stat. § 609.52).
- "'Wage theft" has been added to the criminal definition of theft under Minn. Stat. § 609.52, subd. 2(19), and sanctions for committing wage theft are:
- Imprisonment for not more than 20 years, payment of a fine of not more than $100,000 or both if the value of the wages stolen is more than $35,000.
- Imprisonment for not more than 10 years, payment of a fine of not more than $20,000 or both if the value of the wages stolen exceeds $5,000.
- Imprisonment for not more than five years, payment of a fine of not more than $10,000 or both if the value of wages stolen is more than $1,000 but not more than $5,000.
- Imprisonment for not more than one year, payment of a fine of not more than $3,000 or both if the value of the property or services stolen is more than $500 but not more than $1,000.

When determining the value of the wages stolen, the law allows for the amount of employee wages that were stolen through wage theft to be aggregated within any six-month period."

Minnesota Department of Labor and Industry, Summary of Minnesota's New Wage Theft Law at p. 5, June 2019 (citing Minn. Stat. § 609.52).

Minnesota Statutes Section 181.032(d) requires that employees be provided written notice at the beginning of employment, which, among other things, must provide detailed information regarding pay, allowances, vacation, sick time, or paid time off, employment status, deductions, number of days in a pay period, the legal name of the employer, the physical address of the employer's principle place of business, and the employer's telephone number. The wage theft law also has requirements regarding the information earning statements have to include (Minn. Stat. § 181.032) and records the employer must keep (Minn. Stat. § 177.30).

12. Is there a state statute governing paid or unpaid leaves?

There are several Minnesota statutes governing paid and unpaid leaves.

Minnesota Statutes Sections 181.940 to 181.941, governs pregnancy and parenting leave. Private and public employers with 21 or more employees at at least one site are required to allow eligible employees six weeks of unpaid leave for the birth or adoption of a child. In order to be eligible, an employee has to have worked for the employer for at least 12 consecutive months immediately preceding the request for the leave and has to have averaged at least one-half the number of hours worked per week by full time employees in the same classification. The employer must continue to make health insurance available to the employee, if previously provided. However, the employer is not required to pay for such coverage during the leave time. An employee returning from leave is entitled to return to a position of comparable duties, number of hours and pay. Employer may not require that accrued sick leave be used to reduce the length of unpaid parenting leave.

Minnesota Statutes Section 181.92, Minnesota Adoptive Parenting Leave, is a bit different than the leave referenced under Section 181.940, et seq., in that there is no reference to size of employer or period of time of employment preceding the leave request for eligibility purposes. Section 181.92 provides that an employer who permits paternity or maternity time off to a biological father or mother shall, upon request, grant time off, with or without pay, to an adoptive father or mother. The minimum time off is four weeks, unless the employer has an established policy of time off for a biological parent which sets a period of time off of less than four weeks. In the latter event, the established period shall be the minimum period for adoptive parent leave. Though containing different eligibility requirements and leave duration, Section 181.940 to 181.941, and Section 181.92 can be harmonized. The leave contemplated under 181.92 can arise where the eligibility requirements of 181.94 have not been met, but the employer, as a matter of policy, permits biological parents parenting leave notwithstanding. However, interpretative case law has not been found and Sections 181.940 to 181.94 were written after 181.92.

Pursuant to Minnesota Statutes Section 181.9413, governing sick leave benefits and care of relatives, mandates that employers with 21 or more employees at at least one site, permit employees to use personal sick leave benefits provide by the employer for absences due to illness of or injury to the employee's child (including adult child), spouse, sibling, parent, mother-in-law, father-in-law, grandchild, grandparent, or stepparent, for such reasonable periods as may be necessary, on the same terms the employee is able to use sick leave benefits for the employee's own illness or injury. Minnesota Statutes § 181.9413(b) further provides that employees may use sick leave as allowed under this section for safety leave, whether or not the employer allows use of sick leave for that purpose. "Safety leave" is defined as for the purpose of providing or receiving assistance because of sexual assault, domestic abuse or stalking. *Id*. An employee returning from leave under 181.9413 is entitled to return to his or her former position. Minn. Stat. § 181.942, subd. 1. The Minnesota Department of Labor Standards and Apprenticeship is authorized to accept, investigate, and seek resolution of employee complaints of violation of section 181.9413. Minn. Stat. § 181.9435.

Minnesota Statutes Section 181.9412, governing leave to attend school conferences and related activities, requires that employers grant an employee leave of up to a total of 16 hours during any 12-month period to attend school conferences or school-related activities related to the employee's child, provided the conferences or school-related activities cannot be scheduled during nonwork hours. When the leave cannot be scheduled during nonwork hours and the need is foreseeable, the employee must provide reasonable prior notice and make a reasonable effort to schedule the leave so as not to disrupt unduly the operations of the employer.

Minnesota Statutes Section 181.945, governing bone marrow donation leave, and Minnesota Statutes Section 181.9456, governing leave for organ donation, require that employers who employ 20 or more employees at at least one site grant up to a combined length of 40 hours of paid leave to an employee who performs services for the employer for an average of 20 or more hours per week, to undergo a medical procedure to donate bone marrow, an organ or partial organ, to another person. If there is a medical determination that the employee does not qualify as a bone marrow donor, or organ donor, the paid leave of

absence granted to the employee prior to that determination is not forfeited. See Minn. Stat. §§ 181.945, subd. 2 (bone marrow donors) and 181.9456, subd. 2 (organ donors).

Minnesota Statutes provide for several types of leave for military personnel and immediate family members and those in the Civil Air Patrol Service.

Employers who employ 20 or more employees at at least one site, are required to grant an employee who performed services for the employer for an average of 20 or more hours per week, a leave of absence without pay for time spent rendering service as a member of the civil air patrol on the request and under the authority of the state or any of its political subdivisions, unless the leave would unduly disrupt the operations of the employer. Minn. Stat. § 181.946.

Employers of any size must grant employees a leave of absence to an immediate family member of a member of the United States armed forces to attend a send-off or homecoming ceremony for a mobilized service member, not to exceed on day's duration in any calendar year. Minn. Stat. § 181.948.

Employers of any size must grant employees, independent contractors, and individuals working for an independent contractor for compensation, up to ten working days of leave without pay, in instances where an immediate family member, as a member of the United States armed force, has been injured or killed while engaged in active service. Minn. Stat. § 181.947.

Officers or employees of the state or any political subdivision, municipal corporate, or other state public agency must be granted leave while engaging in active service in time or war or other emergency, or during convalescence for an injury or disease incurred during active service. Minn. Stat. § 192.261, subd. 1. This unpaid leave must not extend beyond four years plus such additional time in each case as such office or employee may be required to serve pursuant to law. Provided that the officer or employee received an honorable discharge or certification of satisfactory service, the position has not been abolished or the term of position expired, the officer or employee is not physically or mentally disabled from performing the duties of the position, and that written application for reinstatement is submitted within 90 days after termination of such service, or discharge from hospitalization or medical treatment, the officer or employee shall be reinstated to the prior position or position of like seniority, status, and pay. In addition, the officer or employee shall have the same rights with respect to accrued and future seniority status, efficiency rating, vacation, sick leave, and other benefits as if the officer or employee had been actually employed during the time of such leave. No reinstated officer or employee may be removed or discharged within one year thereafter except for cause, after notice and hearing.

Similarly, officers and employees ordered to a period of active duty for training of not less than three consecutive months shall, upon application for reemployment within 31 days of release from training after satisfactory service, or discharge from hospitalization incident to that training, or one year after scheduled release from that training, whichever is earlier, be entitled to reemployment rights and benefits. Minn. Stat. § 191.261, subd. 5. Once restored to employment, these individuals may not be discharged from the position without cause within six months after restoration. *Id*.

Nonpublic employee National Guard members engaged in active service in the military forces in time of emergency declared by the property authority of any state, are entitled to leave and reinstatement in the same manner and to the same extent as that granted to officers and employees of the state and any political subdivision, municipal corporation, or other state public agency. Minn. Stat. § 192.261, subd. 6.

Minnesota Statutes Section 204C.04 provides employees with reasonable time off to vote without deduction from salary or wages (mandating time off to vote in regularly scheduled elections, elections to fill a vacancy for United States senator or United States representative, an election to fill a vacancy in nomination for a constitutional office, an election to fill a vacancy in the office of state senator or state representative, or a presidential nomination primary).

Minnesota Statutes Section 593.50 protects jurors' employment (prohibits employment deprivation, and threats and coercion, because the employee receives or responds to a summons, serves as juror, or attends court for prospective jury service). An employer who violates this section may be held in criminal contempt, fined up to $700, and imprisoned for not more than six months. If the employee is discharged for exercising rights under the statute, the employee has 30 days within which to bring a civil action seeking recovery of lost wages not exceeding six weeks, reinstatement, and reasonable attorney's fees. *Id*.

Minnesota Statutes Section 611A.036 requires that employers of victims of violent crime, their spouses and immediate family members, and witnesses, reasonable time off to attend criminal proceedings related to the victim's case. An employer is prohibited from discharging, disciplining, threatening, discriminating against, and penalizing an employee regarding the terms and conditions of employment for having taken reasonable time off to attend such criminal proceedings. An employee injured by violation of this section may bring a civil action for recovery of damages, together with costs and disbursements, including reasonable attorney's fees, and may receive such injunctive and other equipment relief, including reinstatement, as determined by the court. Minn. Stata. § 611A.036, subd. 6.

13. Is there a state law governing drug-testing?

Minn. Stat. §§181.950 to 181.957 governs Employment Drug and Alcohol Testing. A significant summary of this law is beyond the scope of this section. However, the statute imposes specific requirements regarding when and under what circumstances such drug and alcohol testing can be accomplished, how it must be accomplished, by whom it must be accomplished, the minimum requirements for employer drug testing policies, policy notice and posting requirements, and the rights and responsibilities of applicants and employees subject to such testing.

One of the major components of this law concerns testing of individuals already employed. This can be found at Section 181.953, subd 10. In summary, an employer cannot discipline, discharge, or discriminate against an employee based upon a positive test result from an initial screening test that has not been verified by a confirmatory test. Moreover, even in the instance where the confirmatory test result is positive, if this was the first such result for the employee, the employer cannot discharge the employee for a positive result on a drug or alcohol test unless several conditions have been met, including the following: (1) the employee has to first be given an opportunity to participate in, at the employee's own expense or pursuant to coverage under an employee benefit plan, either a drug or alcohol counseling or rehabilitation program; and, (2) the employee refuses to participate or has failed to complete the program, as evidence by a withdrawal from the program before its completion or by a positive test result on a confirmatory test after completion of the program.

Remedies for violation of this Chapter include a civil action for damages, injunctive or other equitable relief (e.g. reinstatement and back pay), and attorney's fees if the court determines that the employer knowingly or recklessly violated the statutory requirements. Minn. Stat. §181.956.

14. Is there a medical marijuana statute?

Individuals with qualifying medical conditions such as cancer (producing certain identified conditions), glaucoma, human immunodeficiency virus or acquired immune deficiency syndrome, Tourette's syndrome, amyotrophic lateral sclerosis, seizures including those characteristic of epilepsy, severe and persistent muscle spasms, inflammatory bowel disease, and terminal illness (producing certain identified conditions) may enroll in a state registry and receive medical marijuana. Minn. Stat. § 152.22. There is a rebuttable presumption that patients enrolled in the registry program are engaged in the authorized use of medical cannabis. Minn. Stat. § 152.32, subd. 1. Unless a failure to do so would violate federal law or regulations or cause an employer to lose a monetary or licensing-related benefit under federal law or regulations, an employer may not discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalize a person, if the discrimination is based upon either the person's enrollment in the registry program or a patient's positive drug test for cannabis components or metabolites, unless the patient used, possessed, or was impaired by medical cannabis on the premises of the place of employment or during the hours of employment. Section 152.32, subd. 3.

15. Is there trade secret / confidential information protection for employers?

Employers have used the Minnesota Uniform Trade Secrets act to provide protection from dissemination/unauthorized use of trade secrets and recourse in the event of such unauthorized use. Minn. Stat. §§ 325C.01, et seq. Trade secrets are defined as a formula, pattern, compilation, program, device, method, technique or process that: (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. Section 325C.01, subd. 5. The statute further provides that the existence of a trade secret is not negated merely because an employee has acquired the trade secret without express or specific notice that it is a trade secret if, under all the circumstances, the employee knowns or has reason to know that the owner intends or expects the secrecy of the type of information comprising the trade secret will be maintained. *Id*. Injunctive relief and damages are available. If the disclosure is willful and malicious, the court may award exemplary damages in an amount not exceeding twice any award made. *Id*. Reasonable attorney's fees may be awarded to the prevailing party where a claim of misappropriation is made in bade faith, a motion to terminate an injunction is made or resisted in bad faith, or willful and malicious appropriation exists. See §§ 325C.03 and 325C.04.

16. Is there any law related to employee's privacy rights?

For governmental employees, the Minnesota Government Data Practices Act, Minn. Stat. § 13.01, et seq. ("MGDPA"), limits access to private, nonpublic data. However, public data is available. The MGDPA defines "public data" to include, among other things, the employee's name, identification number (other than Social Security Number), gross salary, salary range, terms and conditions of employment relationship, contract fees, actual gross pension, value and nature of fringe benefits, basis and amount of added remuneration, including expense reimbursement, salary, job title and bargaining unit, job description, education and training background, previous work experience, date of first and last employment, the existence and status of any complaints or charges against the employee, the final disposition of any disciplinary action, and the complete terms of any

agreement settling any dispute arising out of an employment relationship.

Under Minn. Stat. §181.75, polygraph tests of employees or prospective employees is prohibited. Subdivision 1 of this section provides that no employer or agent of an employer may directly or indirectly solicit or require a polygraph, voice stress analysis, or any other tests purporting to test the honesty of an employee or prospective employee. An employer or agent who knowingly sells, administers, or interprets tests in violation of the statute is guilty of a criminal misdemeanor. .

17. Is there any law restricting arbitration in the employment context?

The MHRA has been construed to prohibit the enforcement of arbitration clauses in employment contracts for claims of discrimination and reprisal as the MHRA contains a provision which requires that the procedures (including trial) under the Act are exclusive while pending. *Correll, D.D.S. v. Distinctive Dental Services, P.A.*, 607 N.W.2d 440 (Minn. 2000) (interpreting predecessor to Minnesota Statutes Section 363A.04 (exclusivity)).

18. Is there any law governing weapons in the employment context?

Under Minnesota Statutes, an employer, whether public or private, may establish policies that restrict the carrying or possessing of firearms by employees while acting in the course and scope of the employment. Employment related sanctions may be invoked for a violation. Minn. Stat. § 624.714, subd. 18(a). However, an employer may not prohibit the lawful carrying or possessing of firearms in a parking facility or parking area. *Id*. at subd. 18(c).

19. Miscellaneous employment or labor laws not discussed above?

Minnesota Statutes Sections 181.960 to Minn. Stat. 181.966, govern personnel record review and access. An employer who has 20 or more employees must provide an employee with an opportunity to review the employee's personnel record no later than 7 working days (14 working days if the personnel record is located outside the state) after receipt of a written request. "Personnel record" is a term of art and is defined as:

"[A]ny application of employment; wage or salary history; notices of commendation, warning, discipline, or termination; authorization for a deduction or withholding of pay; fringe benefit information; leave records; and employment history with the employer, including salary and compensation history, job titles, dates of promotions, transfers, and other changes, attendance records, performance evaluations, and retirement record."

Minn. Stat. 181.960, subd. 4. An employer must provide written notice to a job applicant upon hire of the rights and remedies provided in the statute. Upon the employee's request, the employer must provide a copy of the personnel record to the employee at no charge.

Minnesota Statutes Section 181.933 addresses notice of employment termination. This statute permits the employee, within 15 days of employment termination, to request in writing that the employer provide the terminated employee with the reasons for termination. Within 10 working days of receipt, the employer is required to inform the employee of the truthful reasons for termination.

Section 363A.31 of the MHRA addresses limitation on waivers of claims under the Act. Prospective waiver of claims, i.e., for conduct that occurs after execution of the waiver or release is contrary to public policy and is void. In addition, the employee must be informed of the right to rescind the waiver of claims under the MHRA within 15 calendar days of its execution. Rescission can be hand-delivered or sent by mail. If rescission is by mail, to be effective it must be post-marked within the 15-day period, properly addressed to the waived or released party, and sent by certified mail return receipt requested.

Minnesota Statutes protect an employee's right to inventions not related to employment. Under Minnesota Statutes Section 181.78, an employer may not require an employee to assign the employee's rights in an invention for which no equipment, supplies, facility or trade secret information of the employer was used and which was developed entirely on the employees own time, and (1) which does not relate (a) directly to the business of the employer or (b) to the employer's actual or demonstrably anticipated research or development, or (2) which does not result from any work performed by the employee for the employer. Any provision in an agreement or handbook provision to the contrary is void and unenforceable. Moreover, any employment agreement requiring the employee to assign or offer to assign employee rights to any invention must contain a written notification of the employee's statutory rights.

Minnesota Statutes Section 116L.976 speaks to an early warning system regarding plant closings and substantial layoffs. This section encourages employers considering a decision to effect plant closings, substantial layoff, or relocations of operations in Minnesota, to inform the Commissioner of the Department of Labor, the employees of the affected establishment, any employee organization representing the employees, and the local government unit in which the affected establishment is located. This section requires employers providing the above notice, and those who must provide notice of a plant closing, substantial layoff, or relocation of operations under the Worker Adjustment and Retraining Notification Act, United States Code,

title 29, section 2101, to also report to the commissioner the names, addresses, and occupations of the employees who will be or have been terminated.

Minnesota Statutes Section 181.970 governs employee indemnification. Subject to certain exceptions relating to public employment, contracts governing indemnification rights, that governed by other law, or that relating to indemnification of employees of business or nonprofit corporations, limited liability companies or other legal entities, Minnesota employers are required to defend and indemnify employees for civil damages, penalties, or fines claimed or levied against the employee, provided that the employee:

(1) was acting in the performance of the employee's position;

(2) was not guilty of intentional misconduct, willful neglect of duties of the employee's position, or bad faith; and

(3) has not been indemnified by another person for the same damages, penalties, or fines.

Id. at subd. 1. A recent Minnesota Court of Appeals decision interpreting this section held that a valet company could not seek indemnification from an employee for the employee's negligence resulting in damage to the vehicles of two customers. *First Class Valet Services, LLC v. Gleason*, 892 N.W.2d 848 (Minn. Ct. App. 2017). Among the reasons cited by the court was that this would create a circular obligation; the employer would have to indemnify the employee for any recovery by the employer. *Id*. at 851-52.

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1. Is the state generally an employment-at-will state?

Yes. "The at-will employment doctrine is well-established in Missouri law." *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770, 775 (Mo. 2014)(en banc). Absent an employment contract with a definite statement of duration, an employment at-will is created. *See id*. "An employer may terminate an at-will employee 'for any reason or for no reason.'" *Id*., quoting *Margiotta v. Christian Hosp. Ne. Nw.*, 315 S.W.3d 342, 345 (Mo. 2010)(en banc).

2. Are there any statutory exceptions to the employment-at-will doctrine?

Yes. There are statutory exceptions to the employment-at-will doctrine:

1) Under the Missouri Human Rights Act, an employer cannot terminate or otherwise discriminate against an at-will employee because of the employee's race, color, religion, national origin, sex, ancestry, age or disability. *See* Mo. Rev. Stat. § 213.055; *Farrow v. St. Francis Med. Ctr.*, 407 S.W.3d 579, 595 (Mo. 2013)(en banc). Nor can an employer retaliate against an employee for opposing a discriminatory employment practice, filing a complaint or otherwise participating in a proceeding concerning the Missouri Human Rights Act. *See* Mo. Rev. Stat. § 213.070(2).

2) An employee may not be discharged (or discriminated against) in retaliation for filing a workers' compensation claim. Mo. Rev. Stat. § 287.780.

3) An employee may not be retaliated against for reporting a fraudulent action in order to obtain a healthcare payment or for participating in a healthcare fraud investigation. Mo. Rev. Stat. § 191.908.

4) An employee may not be retaliated against for reporting a violation of a law or ordinance applicable to the nursing home. Mo. Rev. Stat. § 198.301.

5) An employee of the municipal police force may not be retaliated against for reporting the illegal actions of another employee. Mo. Rev. Stat. § 84.342.

6) An employee of a penal facility may not be retaliated against for reporting the abuse of an offender. Mo. Rev. Stat. § 217.410.

7) A state employee may not be retaliated against for reporting a violation of law or for reporting a mismanagement, gross mismanagement, waste, fraud, or danger to public health and safety. Mo. Rev. Stat. § 105.055.

8) An employer cannot terminate or refuse to hire a person for that person's lawful use of alcohol or tobacco products away from the employer's premises during time off unless the use interferes with the employee's performance or the employer's business. Mo. Rev. Stat. § 290.145.

3. Are there any public policy exceptions to the employment-at-will doctrine?

Historically, there has been a public policy exception, also referred to as the wrongful or retaliatory discharge doctrine, to the at-will employment doctrine in Missouri.

The public policy exception provided that "[a]n at-will employee may not be terminated (1) for refusing to violate the law or any

well-established and clear mandate of public policy as expressed in the constitution, statutes, regulations promulgated pursuant to statute, or rules created by a governmental body or (2) for reporting wrongdoing or violations of law to superiors or public authorities." *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 92 (Mo. 2010)(en banc).

Missouri appellate courts had recognized two additional categories under the public policy exception: (1) where employees are terminated for acting in a manner public policy would encourage, and (2) where employees are terminated for filing a claim for worker's compensation. *See Delaney v. Signature Health Care Found.*, 376 S.W.3d 55, 57 (Mo. App. E.D. 2012); *see also Graham v. Hubbs Mach. & Mfg.*, 92 F. Supp. 3d 935, 940 n. 1 (E.D. Mo. 2015), quoting *Delaney*, 376 S.W.3d at 57.

Under the common law, the necessary elements to state a claim for wrongful discharge in violation of public policy had been as follows: (1) plaintiff acted in a manner protected by public policy; (2) defendant discharged plaintiff; (3) plaintiff's actions protected by public policy were a contributing factor in plaintiff's discharge; and (4) plaintiff sustained damages. *See* Missouri Approved Instructions 38.03; *see also Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 94-95 (Mo. 2010)(en banc)(holding that an employee's actions need only be a contributing factor to the termination; the employee's actions need not be the exclusive cause).

In August 2017, a Whistleblower Protection Act ("WPA") statute was enacted, whose purpose was to abrogate these common law claims. Since the law is relatively new, it is unclear whether those claims accruing or arising prior to the enactment of the new law are still viable under the former common law theory. Also, since the WPA only applies to employers with six or more employees, it is unclear whether the common law theory may continue to apply to employers with less than 6 employees. See below for further discussion regarding the WPA.

4. Is there any law related to the hiring process?

Yes. The Missouri Department of Labor provides a summary of unauthorized, discriminatory pre-employment inquiries on its website.

See http://labor.mo.gov/mohumanrights/Discrimination/pre_employ_inquiries.

a. Immigration

Missouri law prohibits employers from knowingly employing, hiring, or continuing to employ an unauthorized alien. *See* Mo. Rev. Stat. § 285.530.

b. Recruitment/Advertisement/Applications

An employer or employment agency may not print or circulate any job advertisement, use any application form, or make any inquiry "which expresses, directly or indirectly, any limitation, specification, or discrimination, because of race, color, religion, national origin, sex, ancestry, age or disability unless based upon a bona fide occupational qualification." Mo. Rev. Stat. § 213.055.1.

Nor may an employment agency refuse to refer or otherwise discriminate against "any individual because of his race, color, religion, national origin, sex, ancestry, age as it relates to employment, or disability, or to classify or refer for employment any individual on the basis of his race, color, religion, national origin, sex, ancestry, age or disability." Mo. Rev. Stat. § 213.055.1.

c. Criminal Background

School District Employees. School districts are required to conduct criminal background checks on any person who is authorized to have contact with a pupil. *See* Mo. Rev. Stat. §§ 168.071 and 168.133. Additionally, school districts are required to conduct criminal background checks on school bus drivers, including those employed by a pupil transportation company under contract with the district. *See* Mo. Rev. Stat. §§ 168.133 and 302.272.5.

Mental Health Facility Employees. Individuals convicted of certain offenses (i.e., mistreatment of patients, serving poor food or sexual offenses) are prohibited from working in a state licensed mental health facility where people are either voluntarily or involuntarily detained. *See* Mo. Rev. Stat. § 630.170.

d. Credit history

There is no specific state statute in Missouri dealing with credit history. *But see* Fair Credit Reporting Act, 15 U.S.C. §1681.

e. Medical history

Employers are prohibited from using genetic information (DNA and RNA) or genetic test results in the employment decision-making process. *See* Mo. Rev. Stat. § 375.1306.

Regulations promulgated by the Missouri Commission on Human Rights generally prohibit pre-employment inquiries regarding mental and physical disabilities, but employers may inquire into an applicant's ability to perform specific job-related functions and may conduct pre-employment medical examinations relating to minimum physical standards under certain circumstances. *See* 8 C.S.R. 60-3.060.

The federal Americans with Disabilities Act expressly prohibits employers from asking certain pre-employment interview questions. *See* 42 U.S.C. § 12112(d)(2)(A).

f. Employment history

N/A

g. Notification to unsuccessful applicants

N/A

h. Offers of employment

N/A

5. Does the state recognize implied employee contracts under employment handbooks, policies, or practices?

No. The Missouri Supreme Court has held that an employer's unilateral act of publishing an employee handbook does not create any contractual rights for employees. *See Johnson v. McDonnell Douglas Corp.*, 745 S.W.2d 661, 662 (Mo. 1988). Following the Missouri Supreme Court's decision in *Johnson,* Missouri courts have consistently held that employment handbooks do not constitute employment contracts or vest employees with contractual rights. *See W. Cent. Mo. Regional Lodge No. 50 v. Bd. Of Police Commissioners*, 939 S.W.2d 565, 567 (Mo. App. W.D. 1997); *see, e.g., Jennings v. SSM Health Care St. Louis*, 355 S.W.3d 526, 533-34 (Mo. App. E.D. 2011)(severance policy published by employer as part of its general corporate policies and procedures did not create any contractual right but rather just informed employees of the opportunity for severance that was available to qualified employees).

6. Does the state have a right to work law or other labor / management laws?

No. Missouri Revised Statute § 290.590 took effect on August 28, 2017 and provided that no person can be required, as a condition of employment, to be a member of a union, to pay dues, fees, assessments or similar charges to a union, or to pay to any charity or third party the charges, fees, or assessments that are charged to union members. The statute further declared as unlawful, null, and void any agreement that violate the statute.

On February 21, 2017, a petition for voter's referendum was received by the Secretary of State's Office to either approve or reject Missouri Revised Statute § 290.590. The referendum vote was held on August 7, 2018, and the statute was rejected by referendum, Proposition A, by the voters. Thus, Missouri Revised Statute § 290.590 was short-lived and is no longer in effect.

7. What tort claims are recognized in the employment context?

a. Intentional Infliction of Emotional Distress

Missouri courts have recognized causes of action for intentional infliction of emotional distress asserted by employees arising out of the employment context. To establish a claim for intentional infliction of emotional distress, a claimant must show: (1) the defendant acted intentionally or recklessly; (2) the defendant's conduct was extreme and outrageous; and (3) the conduct was the cause of severe emotional distress. *See Polk v. INROADS/St. Louis*, 951 S.W.2d 646, 648 (Mo. App. E.D. 1997)(Plaintiff employee successfully pled intentional infliction of emotional distress when employer's retaliatory behavior was outrageous).

But see Nazeri v. Missouri Valley College, 860 S.W.2d 303, 316 (Mo. 1993)(en banc)(A cause of action for intentional infliction of emotional distress "does not lie when the offending conduct consists only of a defamation").

b. Negligent Infliction of Emotional Distress

An employee may bring a negligent infliction of emotional distress claim against his or her employer by alleging that: (1) the employer should have realized its conduct involved an unreasonable risk of causing the employee's emotional distress, and (2) the distress is "medically diagnosable" and "medically significant." *See Beasley v. Affiliated Hosp. Prods.*, 713 S.W.2d 557, 559-61 (Mo. App. E.D. 1986).

c. Assault/Battery

An employer may be liable for the acts committed by its employees, including assault and battery, based on the doctrine of respondeat superior. *See Porter v. Thompson*, 206 S.W.2d 509, 512 (Mo. 1947)(employer could be liable for assault committed by employee if employer knew or should have known of employee's vicious propensities).

d. Invasion of Privacy

Missouri courts have recognized a privacy right with respect to personnel records "that should not be lightly disregarded or dismissed." *State ex rel. Delmar Gardens N. Operating, LLC v. Gaertner*, 239 S.W.3d 608, 611 (Mo. 2007)(en banc); *see also State ex rel. Crowden v. Dandurand*, 970 S.W.2d 340, 343 (Mo. 1998)(en banc)("Employees have a fundamental right of privacy in employment records.").

The elements of the common-law tort of invasion of privacy are: (1) publication or publicity, (2) of private matters in which the public has no legitimate concern, (3) so as to bring humiliation or shame to a person of ordinary sensibilities; and (4) the absence of any waiver or privilege. See Chasnoff v. Mokwa, 466 S.W.3d 571, 579 (Mo. App. E.D. 2015).

In Meyerkord v. Zipatoni Co., 276 S.W.3d 319 (Mo. App. E.D. 2008), the court recognized the tort of false light invasion of privacy. In this case, an employee brought suit against his former employer after the employer failed to remove the employee's name as a registrant from a website operated by the employer before launching a viral internet marketing campaign. Negative reactions to the campaign were targeted at the former employee. The employee alleged that his privacy had been invaded and that his reputation had been injured from this, causing him to suffer embarrassment, harassment and mental anguish. Id. at 321-22. Quoting the Restatement (Second) of Torts, the court set out the elements of the tort of false light invasion of privacy:

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if: (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Id. at 323.

e. Fraud

Fraud in the negotiation of an employment contract can amount to a recognized cause of action. *O'Neal v. Stifel, Nicolaus & Co.*, 996 S.W.2d 700, 702 (Mo. App. E.D. 1999).

See also Messina v. Greubel, 358 Mo. 439, 441 (Mo. 1948)(In an action for fraud, an employee who was induced to invest in his employer's company by false representations as to the company's financial condition had a right to rely on the employer's statements).

f. Negligent Hiring

Missouri recognizes causes of action for negligent hiring and negligent retention of an employee where the employer knew or should have known of the employee's dangerous proclivities. *See Gaines v. Monsanto Co.*, 655 S.W.2d 568, 570-71 (Mo. App. E.D. 1983). "Negligent hiring or retention liability is independent of respondeat superior liability for negligent acts of an employee acting within the scope of his employment." *Id.* at 570. To establish a claim for negligent hiring or negligent retention under Missouri law, a claimant must demonstrate: (1) the employer knew or should have known of the employee's dangerous proclivities, and (2) the employer's negligence was the proximate cause of the plaintiff's injuries. *See Gibson v. Brewer*, 952 S.W.2d 239, 246 (Mo. 1997)(en banc).

8. Is there a common law or statutory prohibition of retaliation?

Yes. The Missouri Human Right Act (Missouri Revised Statute § 213.055) ("MHRA") prohibits discrimination on the basis of race, color, national origin, religion, sex, ancestry, age, and disability.

Prior to bringing a civil action in court, however, the claimant must first exhaust his/her administrative remedies with the Missouri Commission on Human Rights. In order to exhaust his/her administrative remedies, an aggrieved employee must file a signed, written complaint (*i.e.* charge of discrimination) with the Missouri Commission on Human Rights ("MCHR") within 180 days of the discriminatory action. The complaint must state the name and address of the person alleged to have committed the discriminatory action and must describe the discriminatory action. The MCHR will investigate and attempt to remedy the situation. If the MCHR is unable to remedy the situation within 180 days of the filing of the complaint, the employee may request a "right-to-sue" letter. Upon receipt of this letter, the employee may then file a civil lawsuit in an appropriate court within 90 days of the date the right to sue letter was issued.

An employee may also bring a claim for hostile work environment based upon discriminatory acts and/or harassment prohibited by the Missouri Human Rights Act. To establish a claim for hostile work environment, a claimant must demonstrate that: (1) he/she is a member of a protected group; (2) he/she was subjected to unwelcome protected group harassment; (3) his/her membership in a protected group was a [motivating] factor in the harassment; (4) a term, condition, or privilege of his/her employment was affected by the harassment; and (5) the employer knew or should have known of the harassment and failed to take appropriate action. *See Mohamed Alhalabi v. Mo. Dep't of Natural Res.*, 300 S.W.3d 518, 527 (Mo. App. E.D. 2009).

The August 2017 amendments to the MHRA replaced the former "contributing factor" causation standard. A plaintiff must now prove that a protected classification, such as race, gender, or age, was "the motivating factor" for an employer's alleged adverse employment action. The motivating factor standard requires the employee to establish "the employee's protected classification actually played a role in the adverse action or decision and had a determinative influence on the adverse action."

Missouri regulations provide that an employer is responsible for its acts and those of its supervisory employees with respect to hostile work environment/harassment claims regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. *See* 8 C.S.R. 60-3.040(17)(c); *Pollock v. Wetterau Food Distrib. Group*, 11 S.W.3d 754, 766 (Mo. App. E.D. 1999); *see also Diaz v. AutoZoners, LLC*, 2015 Mo. App. LEXIS 1157, *15 (Mo. App. W.D. Nov. 10, 2015)("When the harasser is a supervisor of the harassed employee, agency principles apply, and the employer is held vicariously liable for the acts of the supervisor.").

Due to the amendments to the statute in August 2017, the MHRA no longer allows for individual liability against the alleged harasser/discriminator, which was formerly a key difference from federal anti-discrimination law. *See Cooper v. Albacore Holdings, Inc.*, 204 S.W.3d 238 (Mo. App. E.D. 2006)(recognizing individual liability under the MHRA as an issue of first impression).

Claims for discrimination or hostile work environment under the MHRA allow for the recovery of punitive damages, attorneys' fees and costs, as well as prejudgment interest. *See* Mo. Rev. Stat. § 213.111; *Lynn v. TNT Logistics N. Am. Inc.*, 275 S.W.3d 304, 312 (Mo. App. W.D. 2008). But "[a] submissible case for punitive damages requires clear and convincing proof that the defendant intentionally acted either by a wanton, willful, or outrageous act, or reckless disregard for an act's consequences, from which evil motive is inferred." *Ellison v. O'Reilly Auto. Stores, Inc.*, 463 S.W.3d 426, 430 (Mo. App. W.D. 2015).

The August 2017 changes to the MHRA also added damage caps on a sliding scale. Damages awarded under the MHRA as amended cannot exceed (1) actual back pay and interest on it and (2) a fixed amount based on the number of employees that a defendant employs at the relevant time.

The punitive damage scale is as follows:	Punitive Damages Not To Exceed:
More than 5 employees, but less than 100 employees:	$50,000
More than 100 employees, but less than 200 employees:	$100,000
More than 200 employees, but less than 500 employees:	$200,000
More than 500 employees:	$500,000.

Attorneys' fees are not included within the caps and remain available to a prevailing plaintiff in addition to back pay, interest, and punitive damages.

a. Race and Color

(*See* discussion above regarding Discrimination/Hostile Work Environment based on Missouri Human Rights Act).

b. Ethnic/National Origin

(*See* discussion above regarding Discrimination/Hostile Work Environment based on Missouri Human Rights Act).

c. Gender

(*See* discussion above regarding Discrimination/Hostile Work Environment based on Missouri Human Rights Act).

Missouri law specifically prohibits discrimination in salary based on gender. Missouri Revised Statute § 290.410 provides:

Notwithstanding any other provisions of the law, no employer shall pay any female in his employ at wage rates less than the wage rates paid to male employees in the same establishment for the same quantity and quality of the same classification of work, provided that nothing herein shall prohibit a variation of rates of pay for male and female employees engaged in the same classification of work based upon a difference in seniority, length of service, ability, skill, difference in duties or services performed, difference in the shift or time of day worked, hours of work, or restrictions or prohibitions on

lifting or moving objects in excess of specified weight, or other reasonable differentiation, or factors other than sex, when exercised in good faith.

d. Age

(*See* discussion above regarding Discrimination/Hostile Work Environment based on Missouri Human Rights Act).

e. Religion

(*See* discussion above regarding Discrimination/Hostile Work Environment based on Missouri Human Rights Act).

f. Disability

(*See* discussion above regarding Discrimination/Hostile Work Environment based on Missouri Human Rights Act).

g. Veteran / military status

Missouri Revised Statute § 41.730 provides:

1. No person shall discriminate against any member of the organized militia or of the Armed Forces of the United States because of his membership therein.

2. No person shall prohibit or refuse entrance to any member of the organized militia of this state or of the armed forces of the United States into any public entertainment or place of amusement because such member is wearing the uniform of the organization to which he belongs.

3. No employer or officer or agent of any corporation, company or firm, or other person, shall discharge any person from employment because of being a member of the organized militia of this state or hinder or prevent him from performing any militia service he may be called upon to perform by proper authority or dissuade any person from enlistment in the organized militia by threat or injury to him in respect to his employment, trade or business, in case of his enlistment. Any person violating any of the provisions of this section is guilty of a misdemeanor.

h. Genetic Information

Missouri Revised Statute § 375.1306 provides:

1. An employer shall not use any genetic information or genetic test results . . . of an employee or prospective employee to distinguish between, discriminate against, or restrict any right or benefit otherwise due or available to such employee or prospective employee.

. . .

2. If the director determines that a person has engaged, is engaging in, or has taken a substantial step toward engaging in an act, practice or course of business constituting a violation of this section or a rule adopted or order issued pursuant thereto, or that a person has materially aided or is materially aiding an act, practice, omission, or course of business constituting a violation of this section or a rule adopted or order issued pursuant thereto, the director may issue such administrative orders as authorized under section 374.046. A violation of any of these sections is a level two violation under section 374.049.

3. If the director believes that a person has engaged, is engaging in, or has taken a substantial step toward engaging in an act, practice or course of business constituting a violation of this section or a rule adopted or order issued pursuant thereto, or that a person has materially aided or is materially aiding an act, practice, omission, or course of business constituting a violation of this section or a rule adopted or order issued pursuant thereto, the director may maintain a civil action for relief authorized under section 374.048. A violation of any of these sections is a level two violation under section 374.049.

“Genetic information” includes: “the results of a genetic test. Genetic information shall not include family history, the results of routine physical measurements, or the results of chemical, blood, urine analysis, or the results of tests for drugs or the presence of the human immunodeficiency virus, or from results of any other tests commonly accepted in clinical practice at the time.” Mo. Rev. Stat. § 375.1300(3).

i. Sexual Orientation

Sexual orientation is not explicitly a protected class under the Missouri Human Rights Act. However, the Governor’s Executive Order 10-24 prohibits discrimination based upon sexual orientation with respect to applications for jobs in Missouri’s executive branch.

The Missouri Supreme Court recently opened the door for certain discrimination claims implicating sexual orientation and sexual/gender identity under the MHRA, though the court did not go so far as to hold that sexual orientation or sexual/gender identity are themselves protected classifications under the MHRA. In *Lampley v. Missouri Commission on Human Rights*, SC96828 (February 26, 2019), the court held that an employee who suffers an adverse employment decision based on sex-based stereotypical attitudes of how a member of the employee's sex should act can support an inference of unlawful sex discrimination under the MHRA. It was the claimant's assertion that his employer treated him differently because he did not exhibit the stereotypical attributes of how a male should appear and behave, not the claimant's sexual orientation itself, that formed the basis of the claim. For that reason, the Missouri Supreme Court concluded that the allegations asserted by the claimant in his charge of discrimination stated a claim for sex discrimination and that the Missouri Human Rights Commission should have allowed the claimant to proceed with those claims. Note, though, that the Missouri Supreme Court did not rule upon the merits of the claims; rather, the court simply held that the claimant should have been given the opportunity to present evidence with respect to his claims.

Similarly, in *R.M.A. v. Blue Springs R-IV School District*, SC96683 (February 26, 2019), decided the same day as *Lampley*, the Missouri Supreme Court held that a transgender student should be allowed to proceed with a claim against the Blue Springs R-IV School District arising out of the school district's refusal to allow the student to use the boys' restroom and locker rooms. The Missouri Supreme Court, focusing solely on the allegations in the student's pleading, which the court was required to accept as true for purposes of considering the motion to dismiss at issue, found that the student had stated a claim for sex discrimination because the pleading alleged that the school district's refusal to allow the student to use the boys' restroom and locker rooms was "on the grounds of his sex." Once again, the court did not hold that the student's sexual/gender identity was itself a protected class under the law, nor did the court rule upon the merits of the student's claim or comment upon whether the student would ultimately be successful on such a claim. (NOTE: The school district has filed a motion for rehearing, which is currently pending. Thus, the fate of this particular decision is unclear at this time).

j. Sexual identity

See Section 8(i) above.

k. Other – List

N/A

9. Is there a common law or statutory prohibition of retaliation?

a. Discrimination Claims

The Missouri Human Rights Act ("MHRA") prohibits retaliation or discrimination against an individual who has opposed discrimination prohibited by the Act or who has "filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding or hearing conducted pursuant" to the Act. *See* Mo. Rev. Stat. § 213.070(2).

Prior to bringing a retaliatory claim in court, however, an aggrieved employee must first exhaust his/her administrative remedies by filing a signed, written complaint (*i.e.* charge of discrimination) with the Missouri Commission on Human Rights ("MCHR"). The complaint must be filed within 180 days of the retaliatory action. The complaint must state the name and address of the person alleged to have committed the retaliatory action and must describe the retaliatory action. The MCHR will investigate and attempt to remedy the situation. If the MCHR is unable to remedy the situation within 180 days of the filing of the complaint, the employee may request a "right-to-sue" letter. Upon receipt of this letter, the employee may then file a civil lawsuit in an appropriate court within 90 days of the date the right to sue letter was issued.

Prior to the August 2017 amendments to the MHRA, to establish a claim for unlawful retaliation, a plaintiff must demonstrate that: (1) the plaintiff complained of unlawful discrimination; (2) the employer took an adverse action against the plaintiff; and (3) a causal relationship existed between the complaint of discrimination and the adverse employment action. *See Cooper v. Albacore Holdings, Inc.*, 204 S.W.3d 238, 245 (Mo. App. E.D. 2006). However, the August 2017 amendments changed the burden of proof to require claimants to now show that the claimant's complaint of unlawful discrimination was the "motivating factor" of the adverse action (not simply that the complaint was a "contributing factor" to the adverse action).

Like discrimination claims, the Missouri Human Rights Acts no longer allows for individual liability to be imposed upon the individual who retaliated against the aggrieved claimant.

Attorneys' fees, court costs, and punitive damages are recoverable with respect to claims for retaliation under the Missouri Human Rights Act. *See* Mo. Rev. Stat. § 213.111.2. The MHRA places a cap on the amount of punitive damages that can be awarded. *See* Section 8 above.

b. Workers' Compensation Claims

Missouri Revised Statute § 287.780 provides that "[n]o employer or agent shall discharge or in any way discriminate against any employee for exercising any of his rights under this chapter. Any employee who has been discharged or discriminated against shall have a civil action for damages against his employer."

Again, prior to August 2017, to establish a claim under § 287.780, an employee must have demonstrated that: (1) the employee was employed by the employer before the injury; (2) the employee filed a workers' compensation claim; (3) the employer discriminated against or discharged the employee; and (4) the employee's filing of a claim was a contributing factor to the employer's actions. *See Deml v. Sheehan Pipeline Constr.*, 452 S.W.3d 211, 214 (Mo. App. E.D. 2014). In August 2017, the statute was amended to require a claimant to show that the employee's filing of a claim was the "motivating factor" of the employer's action, not simply that it was a "contributing factor." This change thus increases the burden of proof on claimants.

Punitive damages are recoverable with respect to claims for retaliatory discharge in violation of § 287.780. *See Reed v. Sale Memorial Hospital & Clinic*, 698 S.W.2d 931 (Mo. App. S.D. 1985).

c. Military Service

"No member of the organized militia shall be discharged from employment . . . because of being a member of the organized militia, nor shall he be hindered or prevented from performing any militia service he may be called upon to perform by proper authority nor otherwise be discriminated against or dissuaded from enlisting or continuing his service in the militia by threat or injury to him in respect to his employment. Any officer or agent of the aforementioned agencies violating any of the provisions of this section is guilty of a misdemeanor." Mo. Rev. Stat. § 105.270.

d. Political Activities

It is a misdemeanor punishable by imprisonment of not more than one year and/or by a fine of not more than $2,500.00 for an employer to prevent an employee from engaging in political activities, including running for a political office or participating in a political campaign. *See* Mo. Rev. Stat. § 115.637.6.

e. Medical Leaves

Public employers are prohibited from penalizing public employees for taking leave following bone marrow or organ donation. *See* Mo. Rev. Stat. § 105.266.3.

f. Maternity/Paternity Leaves

There are no Missouri laws regarding maternity or paternity leave. However, discharge or discrimination based upon pregnancy constitutes discrimination based on sex, which is prohibited by the Missouri Human Rights Act. *See Self v. Midwest Orthopedics Foot & Ankle, P.C.*, 272 S.W.3d 364, 371 (Mo. App. W.D. 2008).

g. Whistle Blowing

In August 2017, Missouri enacted a Whistleblower Protection Act (WPA), R.S.Mo. Sec. 285.575 which abrogated the previously recognized common-law wrongful discharge causes of action. The WPA protects an employee who: (1) reports an employer's unlawful act to the proper authorities; (2) reports to the employer serious misconduct in violation of a clear mandate of public policy found in the constitution, statute, or regulation; or (3) refuses to carry out an employer's unlawful directive.

The Act does not protect managers whose job is to report or provide a professional opinion on the conduct in question. Similarly, the Act does not protect employees who report alleged unlawful conduct to the person the employee claims acted unlawfully. The "motivating factor" standard applies to claims under the WPA. Available remedies under the Act include back pay and medical bills, liquidated damages, and attorneys' fees.

The WPA statute states it is intended 'to codify the existing common law exceptions to the at-will employment doctrine and to limit their future expansion by the courts." R.S.Mo. § 285.575.3. The statute also establishes that, along with the Missouri Human Rights Act and the anti-retaliation provision of the Workers Compensation Law, it shall provide the exclusive remedy for any and all claims of unlawful employment practices. R.S.Mo. § 285.575.3.

An employer subject to the Act is any entity having six or more employees for each working day in each of 20 or more weeks in the current or preceding calendar year. The Act excludes from its coverage the State of Missouri, its agencies, instrumentalities and political subdivisions, State-owned corporations, public institutions of higher education, individuals employed by an employer, and religious or sectarian corporations or associations. R.S.Mo. § 285.575.2(2).

h. Safety Complaints

Public employees may not be retaliated against for reporting a violation of law or for reporting a mismanagement, gross mismanagement, waste, fraud, or danger to public health and safety. *See* Mo. Rev. Stat. § 105.055. Such a claim is a "purely statutory cause of action" which sets forth a different standard than a Missouri common law wrongful discharge claim. *See Hudson v. O'Brien*, 449 S.W.3d 87, 91-96 (Mo. App. W.D. 2014).

i. Voting

Employers are required to give employees three (3) hours of paid time off to vote at elections if there are not three (3) consecutive hours outside of the employee's work time during which the employee could vote. *See* Mo. Rev. Stat. § 115.639.1. The employee must request this leave *prior to* the day of the election, and the employer is permitted to designate the specific time during the day for which the employee will be granted time off to vote. *See id*. "[A]ny such absence for such purpose shall not be reason for the discharge of or the threat to discharge any such person from such services or employment; and such employee, if he votes, shall not, because of so absenting himself, be liable to any penalty or discipline, nor shall any deduction be made on account of such absence from his usual salary or wages. . . ." Mo. Rev. Stat. § 115.639.1. A violation of this provision is a class four election offense (Mo. Rev. Stat. § 115.639.2), and is punishable by imprisonment of not more than one year and/or by a fine of not more than $2,500.00 (Mo. Rev. Stat. § 115.637).

j. Jury Duty/Court Attendance

Employers are prohibited from retaliating against an employee for serving on jury duty. *See* Mo. Rev. Stat. § 494.460. "An employer shall not terminate, discipline, threaten or take adverse actions against an employee on account of that employee's receipt of or response to a jury summons." Mo. Rev. Stat. § 494.460.1.

Employees may recover lost wages and other damages (including reasonable attorneys' fees) and may request reinstatement if they are discharged in violation of § 494.460. *See* Mo. Rev. Stat. § 494.460.2. Claims for violation of the statute must be brought within 90 days of the violation. *See* Mo. Rev. Stat. § 494.460.2.

k. Public Conduct Not Associated with Employment

N/A

l. Private Conduct Not Associated with Employment

N/A

m. Other

N/A

10. Is the state a deferral state for charges filed with the EEOC?

Yes. *See Shepherd v. Kansas City Call*, 905 F.2d 1152, 1153 (8th Cir. 1990)("Missouri is a deferral state because it has authorized the Missouri Commission on Human Rights (MCHR) to process charges of employment discrimination.").

11. Are there any state laws related to compensation, including wage and hour, paid time off, mandatory breaks, fringe benefits, allowable deductions, prevailing wage rates for public contracts, etc.?

a. Wage and Hour

Missouri's state minimum wage is higher than the current federal minimum wage. For 2019, the Missouri state minimum wage is $8.60 per hour. (https://labor.mo.gov/DLS/MinimumWage). The Missouri state minimum wage is scheduled to increase each year by $.85 per hour until it reaches $12 per hour in 2023. Thereafter, the minimum wage may increase or decrease on an annual bases based upon the Consumer Price Index for Urban Wage Earners and Clerical Workers. *See* Mo. Rev. Stat. § 290.502.

St. Louis City enacted Ordinance No. 70078, which imposes an even higher minimum wage upon employers with respect to workers who physically perform services within the City limits. The City of Kansas City enacted a similar ordinance (Ordinance No. 170193) increasing the minimum wage for work performed within city limits. Both ordinances were challenged (separately) in the courts as exceeding the cities' powers. The Missouri Supreme Court upheld the St. Louis City ordinance, finding the ordinance a valid exercise of the city's powers. *See Coop. Home Care, Inc. v. City of St. Louis*, No. SC95401, 2017 Mo. LEXIS 64 (Mo. Feb. 28, 2017). However, in direct response to this holding, the Missouri state

legislature enacted Missouri Revised Statute § 290.528 to essentially nullify the Missouri Supreme Court ruling and which now prohibits cities and local municipalities and subdivisions from enacting minimum wages which differ from the state minimum wage. Thus, the St. Louis City and City of Kansas City ordinances have been rendered invalid, null, and void.

Employees may bring a civil action for underpayment of wages pursuant to Missouri Revised Statute § 290.527. In addition to the wages due and owing to the employee, the statute also provides for an additional liquidated damages penalty in the same amount as the wages due and owing, along with costs and attorneys' fees incurred by the employee in prosecuting the action. *See* Mo. Rev. Stat. § 290.527. An action for underpayment of wages must be commenced within two (2) years of the date that the wages became due and owing. *See id*.

b. Allowable deductions

Missouri allows employers to deduct from an employee's wages the cost associated with the following, provided that the deduction does not drop the employee's wages below minimum wage:

Tools;

Equipment;

Uniforms;

Laundry or cleaning of uniforms;

Maintenance of tools, equipment or uniforms;

Breakage or loss of tools, equipment, or uniforms; and

Any other item required by the employer to be worn or used by the employee as a condition of employment.

C.S.R. 30-4.050.

Deductions authorized by an employee (*e.g.*, insurance premiums, 401k contributions, deductions made pursuant to a written agreement with the employer) and deductions required by law (*e.g.*, garnishments, child and/or spousal support payments, taxes, etc.) are also permissible.

c. Prevailing Wage

Missouri Revised Statute § 290.210 *et seq.* sets forth Missouri's Prevailing Wage Law for public works projects. *See also* 8 C.S.R. 30-010-3.060. "[A]ll workmen employed by or on behalf of any public body engaged in public works exclusive of maintenance work" must be paid "a wage no less than the prevailing hourly rate of wages for work of a similar character in the locality in which the work is performed." *See* Mo. Rev. Stat. § 290.220. A contractor will forfeit a penalty to the contracting public body of $100 per day for each worker that is paid less than the prevailing rate for any work done under the public works contractor by the contractor. *See* Mo. Rev. Stat. § 290.250. Public officials violating Missouri's Prevailing Wage Law can be fined up to $500 for each violation and/or imprisoned for up to six (6) months. *See* Mo. Rev. Stat. § 290.340. (*Note:* There is currently a bill pending in the Missouri legislature (House Bill 104) to abolish and repeal the Prevailing Wage Law. Its fate is not yet known).

12. Is there a state statute governing paid or unpaid leaves?

a. General medical

Public Employees: Employees of the State of Missouri are entitled to twelve (12) weeks of unpaid leave for the birth or adoption of a child, to provide care for a child, spouse, or parent with a serious health condition, or for the treatment of the employee's own health condition. *See* 1 C.S.R. 20-5.020. This leave essentially tracks that available under the federal Family and Medical Leave Act, 29 U.S.C. § 2601 *et seq.*

Additionally, employees of the state of Missouri making a bone marrow or organ donation are entitled to five (5) work days of paid leave for bone marrow donation and thirty (30) workdays for organ donation. *See* Mo. Rev. Stat. § 105.266.

Private Employees: There are no Missouri statutes governing medical leave for private employees; however, certain private employees are entitled to leave under the federal Family and Medical Leave Act, 29 U.S.C. § 2601 *et seq*.

b. Maternity / paternity

Public Employees: Employees of the State of Missouri are entitled to twelve (12) weeks of unpaid leave for the birth or adoption of a child. *See* 1 C.S.R. 20-5.020.

Private Employees: There are no Missouri statutes governing maternity/paternity leave; however, certain private employees are entitled to leave under the federal Family and Medical Leave Act, 29 U.S.C. § 2601 *et seq*.

In addition, the Missouri Human Rights Act and corresponding regulations provide that businesses with six (6) or more employees are required to allow pregnant employees the same leave granted to other employees with a temporary disability or illness. *See* 8 C.S.R. 60-3.040.

Employees forced to leave their work because of pregnancy are eligible for unemployment benefits. *See* Mo. Rev. Stat. § 288.050.

c. Military

Public employees who are members of the National Guard or U.S. reserves are entitled to paid leave of absence without loss of time, regular leave, efficiency rating, or of any other rights or benefits to which otherwise entitled. *See* Mo. Rev. Stat. § 105.270. The leave may be taken for duty or training in state service as ordered by the Governor and as ordered by the adjutant general without regard to length of time. *See id.* Leave is also allowed for ordered duty in U.S. service for a period not to exceed a total of 120 hours in any federal fiscal year. *See id.*

Public employee who are or may become members of the National Guard or U.S. reserves and are engaged in the performance of duty in the service of the United States under competent orders for an extended and indefinite period of time are entitled to unpaid leave without loss of retirement benefits, position, seniority, accumulated leave, impairment of performance appraisal, pay status, work schedule including shift, working days and days off assigned to the officer or employee at the time leave commences, and any other right or benefit to which the employee is entitled. *See* Mo. Rev. Stat. § 41.942.

d. Voting

Missouri Revised Statute § 115.639.1 provides:

> Any person entitled to vote at any election held within this state shall, on the day of such election, be entitled to absent himself from any services or employment in which he is then engaged or employed, for a period of three hours between the time of opening and the time of closing the polls for the purpose of voting, and any such absence for such purpose shall not be reason for the discharge of or the threat to discharge any such person from such services or employment; and such employee, if he votes, shall not, because of so absenting himself, be liable to any penalty or discipline, nor shall any deduction be made on account of such absence from his usual salary or wages; provided, however, that request shall be made for such leave of absence prior to the day of election, and provided further, that this section shall not apply to a voter on the day of election if there are three successive hours while the polls are open in which he is not in the service of his employer. The employer may specify any three hours between the time of opening and the time of closing the polls during which such employee may absent himself.

e. Jury duty

An employee is not required to "use annual, vacation, personal, or sick leave for time spent responding to a summons for jury duty, time spent participating in the jury selection process, or time spent actually serving on a jury." Mo. Rev. Stat. § 494.460.

13. Is there a state law governing drug-testing?

N/A

14. Is there a medical marijuana statute?

Yes. Despite its continuing illegality under federal law, on November 6, 2018, Missouri voters approved Amendment 2, which legalizes under state law the use of medical marijuana in certain circumstances. Amendment 2 does not, however, cover the recreational use of marijuana, and recreational marijuana use remains illegal under both state and federal law. Under the new law, state-licensed physicians are now permitted to recommend and prescribe medical marijuana to patients with qualifying conditions. The list of qualifying medical conditions is broad. Patients must apply for and obtain a medical marijuana identification card from Missouri's Department of Health and Senior Services prior to any medical marijuana use. Card-holding patients and their registered caregivers are allowed to grow marijuana plants in their home and to purchase up to a specified quantity of marijuana for medical use. The state will begin accepting applications for identification cards on or before August 3, 2019.

The new state law does not authorize or permit employees to use marijuana while at work or while on an employer's premises, nor does it authorize employees to work while impaired by any marijuana use that occurred prior to the start of the employee's

work shift. Thus, employers still have the ability to and should enforce their established drug policies, procedures, and testing, even as to medical marijuana use. In fact, Amendment 2 contains a specific carve-out that bars employees from filing claims against their current, former, or prospective employers for wrongful discharge or discrimination based upon the employer's enforcement of a policy that prohibits working or attempting to work while under the influence of marijuana, even for medicinal purposes.

15. Is there trade secret / confidential information protection for employers?

Yes. Under the Missouri Uniform Trade Secrets Act ("MUTSA"), it is unlawful to misappropriate a trade secret. *See* Mo. Rev. Stat. §§ 417.450, *et seq*. To establish a claim under the MUTSA, a claimant must demonstrate that: (1) a trade secret exists; (2) the defendant misappropriated the trade secret; and (3) the plaintiff is entitled to either damages or injunctive relief. *See Cent. Trust & Inv. Co. v. Signalpoint Asset Mgmt., LLC*, 422 S.W.3d 312, 320 (Mo. 2014)(en banc).

A "trade secret" means "information, including but not limited to, technical or nontechnical data, a formula, pattern, compilation, program, device, method, technique, or process, that: (a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." Mo. Rev. Stat. § 417.453(4).

"Misappropriation" is defined as the:

> (a) Acquisition of a trade secret of a person by another person who knows or has reason to know that the trade secret was acquired by improper means; or
>
> (b) Disclosure or use of a trade secret of a person without express or implied consent by another person who:
>
> a. Used improper means to acquire knowledge of the trade secret; or
>
> b. Before a material change of position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake; or
>
> c. At the time of disclosure or use, knew or had reason to know that knowledge of the trade secret was:
>
> i. Derived from or through a person who had utilized improper means to acquire it;
>
> ii. Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
>
> iii. Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use;
>
> Mo. Rev. Stat. § 417.453(2).

Employers may recover injunctive relief from actual or threatened misappropriation (Mo. Rev. Stat. § 417.455); damages for actual loss and unjust enrichment (Mo. Rev. Stat. § 417.457.1); and/or punitive damages when the "misappropriation is outrageous because of the misappropriator's evil motive or reckless indifference to the rights of others" (Mo. Rev. Stat. § 417.457.2).

16. Is there any law related to employee's privacy rights?

Yes. An exception to the Missouri Open Meetings and Records Act allows a "public governmental body" to conduct a closed meeting relating to employee personnel records, performance ratings or applicants for employment. Mo. Rev. Stat.§ 610.021. "This exception to the Act is designed to protect the process by which the ultimate decision is made, not the decision itself." *Librach v. Cooper*, 778 S.W.2d 351,355 (Mo. App. E.D. 1989).

Employers are prohibited from requiring employees to have personal identification microchip technology implanted for any reason. *See* Mo. Rev. Stat. § 285.035.

Missouri courts have recognized a privacy right with respect to personnel records "that should not be lightly disregarded or dismissed." *State ex rel. Delmar Gardens N. Operating, LLC v. Gaertner*, 239 S.W.3d 608, 611 (Mo. 2007)(en banc); *see also State ex rel. Crowden v. Dandurand*, 970 S.W.2d 340, 343 (Mo. 1998)(en banc)("Employees have a fundamental right of privacy in employment records.").

a. Social Media / Computer Usage

> Employees have no expectation of privacy rights with respect to use of employer's computers or private computers used by employees in the course of performing work for their employer, provided that the employer's policy properly advises

employees of such. *See, e.g., United States v. Thorn*, 375 F.3d 679, 683-84 (8th Cir. 2004), reinstated on remand, 413 F.3d 820 (8th Cir. 2005)(holding that a public employee did not have a legitimate expectation of privacy in his computer when employee was fully aware of agency's computer-use policy which states that employees should have no personal right of privacy with respect to agency computers); *State v. Faruqi*, 344 S.W.3d 193, 205 (Mo. 2011)(finding employee had no expectation of privacy or privacy rights arising out of the use of his employer's computer).

b. Polygraph Tests

N/A

c. Confidential / Identity iIformation

N/A

d. Access to Employee Communications, Including Telephone and E-Mail

Employees have no expectation of privacy rights with respect to use of employer's telephones, computers, or email systems, provided that the employer's policy properly advises employees of such. *See, e.g., United States v. Thorn*, 375 F.3d 679, 683-84 (8th Cir. 2004), reinstated on remand, 413 F.3d 820 (8th Cir. 2005)(holding that a public employee did not have a legitimate expectation of privacy in his computer when employee was fully aware of agency's computer-use policy which states that employees should have no personal right of privacy with respect to agency computers); *State v. Faruqi*, 344 S.W.3d 193, 205 (Mo. 2011)(finding employee had no expectation of privacy or privacy rights arising out of the use of his employer's computer).

17. Is there any law restricting arbitration in the employment context?

No. The Missouri Uniform Arbitration Act provides that "[a] written agreement to submit any existing controversy to arbitration or a provision in a written contract, except contracts of insurance and contracts of adhesion, to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract." Mo. Rev. Stat. § 435.350.

"The essential elements of any contract, including one for arbitration, are offer, acceptance, and bargained for consideration." *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770, 774 (Mo. 2014)(internal quotations omitted). Continued at-will employment and a promise to arbitrate is not sufficient consideration to form a valid arbitration agreement. *Id*. at 777.

18. Is there any law governing weapons in the employment context?

Yes. An "owner, business or commercial lessee, manager of a private business enterprise, or any other organization, entity, or person may prohibit persons holding a concealed carry permit or endorsement from carrying concealed firearms on the premises and may prohibit employees, not authorized by the employer, holding a concealed carry permit or endorsement from carrying concealed firearms on the property of the employer. If the building or the premises are open to the public, the employer of the business enterprise shall post signs on or about the premises if carrying a concealed firearm is prohibited. Possession of a firearm in a vehicle on the premises shall not be a criminal offense so long as the firearm is not removed from the vehicle or brandished while the vehicle is on the premises. An employer may prohibit employees or other persons holding a concealed carry permit or endorsement from carrying a concealed firearm in vehicles owned by the employer. . . ." Mo. Rev. Stat. § 571.107(15).

19. Miscellaneous employment or labor laws not discussed above?

a. Reduction in Wages

Missouri Revised Statute § 290.100 requires employers to provide thirty (30) days written notice to employees before reducing the employee's wages. The notice can be sent by written letter or may be posted in a conspicuous location.

b. Payment of Final Wages

While there is no Missouri statute mandating when final wages must be paid to employees who resigns from employment, Missouri Revised Statute § 290.110 provides that when an employer discharges or lays off an employee, the employer must pay the employee all wages due on the day of discharge. If the wages are not paid on the date of discharge, the discharged employee can make demand in writing that the employer pay all final wages due to the employee within seven (7) days of the demand. Failure of the employer to do so results in a statutory penalty in the amount of the employee's regular wages for every day that the wages remain unpaid, up to a maximum of sixty (60) days. *See* Mo. Rev. Stat. § 290.110.

This statute is not applicable to employees who are paid primarily based upon commissions and whose duties include

collection of accounts, care of a stock or merchandise and similar activities, and where an audit is necessary or customary in order to determine the net amount due.

c. Missouri Service Letter Statute

Missouri Revised Statute § 290.140 provides that upon separation from employment, employees who have worked for an employer for at least ninety (90) days may send a written request by certified mail to the employer within a reasonable time, but no later than a year after separation, requesting a letter (called a “service letter”) setting forth the nature and character of the employee’s service for the employer, the dates of employment and the true cause for the employee’s termination or separation from employment. The request must be directed to the employee’s supervisor or manager or the employer’s registered agent if the employer is a corporation and must specifically mention the statute.

Employers are required to send the service letter to the requesting employee within forty-five (45) days of receipt of the employee’s request. Employers who employ less than seven (7) employees are not subject to the statute.

Employers who fail to issue the requested service letter are liable for nominal and punitive damages to the employee requesting the letter. Employers cannot be liable for punitive damages based upon the content of the service letter that is provided to the employee in response to the employee’s request.

d. Sales Commissions

The Missouri Merchandising Practices Act, which generally prohibits false, fraudulent or deceptive merchandising practices, contains provisions regarding causes of action for unpaid sales commissions (*see* Missouri Revised Statute § 407.911-407.915).

A principal who agrees to compensate a sales representative on a commission basis must pay the commissions earned in a timely manner. *See* R.S.Mo. § 407.913. If a contract between a principal and a sales representative is terminated, the commissions then due must be paid within 30 days of the termination date and all commissions which become due after the termination date must be paid within 30 days of becoming due. R.S.Mo. § 407.912.3. When a commission becomes due is first determined by the written contract between the parties. R.S.Mo. § 407.912.1(1). If there is no written contract, then section 407.912.1(2)-(3) provides the framework for determining when a commission becomes due.

Section 407.913 provides that any principal who fails to timely pay a sales representative earned commissions is liable for (1) actual damages and (2) liquidated damages equal to the commissions. The principal may also be liable for the sales representative’s attorneys’ fees and costs. R.S.Mo. § 407.913.

MONTANA

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1. Is the state generally an employment-at-will state?

No. Montana is only “at-will” during an employee’s probationary period. Otherwise, Montana Code Annotated § 39-2-901 provides that discharge is wrongful only if:

(1) It was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy;

(2) The discharge was not for good cause and the employee had completed the employer's probationary period of employment; or

(3) The employer violated the express provisions of its own written personnel policy.

A probationary period is presumed to run for 6 months from the date of hire unless otherwise established by the employer prior to or at the time of hire. Mont. Code Ann. § 39-2-904. However, discharging an employee during the probationary period will still be considered an illegal act if the discharge is based on protected class reasons (illegal discrimination), if discharge is in retaliation for the employer violating its own company policies, or as stated in Section 39-2-901(3), "It was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy."

Good cause under § 39-2-901(2) is defined in the Act as, “reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer’s operation, or other legitimate business reason…” Mont. Code Ann. § 39-2-903.

2. Are there any statutory exceptions to the employment-at-will doctrine?

As discussed in Section 1 above, Montana is an “at-will” state. The Montana Wrongful Discharge from Employment Act is controlling. Exemptions from Montana’s Wrongful Discharge from Employment Act include a discharge:

(1) That is subject to any other state or federal statute that provides a procedure or remedy for contesting the dispute. The statutes include those that prohibit discharge for filing complaints, charges, or claims with administrative bodies or that prohibit unlawful discrimination based on race, national origin, sex, age, disability, creed, religion, political belief, color, marital status, and other similar grounds.

(2) Of an employee covered by a written collective bargaining agreement or a written contract of employment for a specific term.

Mont. Code Ann. § 39-2-912.

If the employer maintains written internal procedures under which an employee may appeal his or her discharge, the employee must first exhaust those procedures prior to filing an action under the Act provided the employer notifies the employee of the existence of such appeals process with 7 days of the date of discharge. See Mont. Code Ann. § 39-2-911. Failure to exhaust internal corporate remedies may bar discharge claims.

3. Are there any public policy exceptions to the employment-at-will doctrine?

Montana’s Wrongful Discharge from Employment Act has a few unique features which may affect an employee’s remedies. For example, the Act preempts common-law remedies for discharge often seen associated with wrongful termination suits in other jurisdictions. “Except as provided in this part, no claim for discharge may arise from tort or express or implied contract.” Mont. Code Ann. § 39-2-913. See *Kulm v. Mont. State Univ.-Bozeman*, 285 Mont. 328, 948 P.2d 243, (1997) (Montana Supreme

Court affirmed summary judgment for university after professor brought claims for, fraud, negligent misrepresentation, and breach of implied duty of good faith), *Meech v. Hillhaven W.*, 238 Mont. 21, 776 P.2d 488, (1989) (Act did not violate fundamental right of full legal redress because no person had a vested right to a rule in common law).

However, the preemption of common-law remedies does not leave plaintiffs without a remedy as the Act provides adequate recompense for wrongful termination. If wrongfully terminated, "the employee may be awarded lost wages and fringe benefits for a period not to exceed 4 years from the date of discharge, together with interest on the lost wages and fringe benefits." Mont. Code Ann. § 39-2-905. The award is offset by any amount the discharged employee could have earned with reasonable diligence. *Id*.

Additionally, discharged employees may be awarded punitive damages under the Act when they establish "by clear and convincing evidence that the employer engaged in actual fraud or actual malice in the discharge of the employee in violation of § 39-2-904(1)(a)[retaliation for employees' refusal to violate public policy]." *Harrell v. Farmers Educ. Coop. Union*, 2013 MT 367, 82, 373 Mont. 92, 115, 314 P.3d 920, 938.

4. Is there any law related to the hiring process?

"The Montana Human Rights Act prohibits discrimination in hiring or employment." *Wagenman v. W. Energy Co.*, 1999 MT 266N, 19.

It is an unlawful discriminatory practice for: an employer to refuse employment to a person, to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment because of race, creed, religion, color, or national origin or because of age (any age), physical or mental disability, marital status, or sex when the reasonable demands of the position do not require an age, physical or mental disability, marital status, or sex distinction.

Mont. Code Ann. § 49-2-303(1)(a).

"…right must include but not be limited to the right to obtain and hold employment without discrimination." Mont. Code Ann. § 49-1-102. Additionally, Article II, Section 4 of the Montana Constitution provides that "neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas." Mont. Const., Art. II § 4.

Numerous other statutory protections related to hiring also exist, many of which are very fact specific. See Mont. Code Ann. § 39-2-215 (hiring discrimination of breastfeeding mothers is unlawful), Mont. Code Ann. § 39-29-203 (private entities may adopt hiring preference for veterans). Prevailing parties, in civil actions brought based on employment or hiring discrimination, may be awarded reasonable attorney fees. See Mont. Code Ann. § 39-2-314.

5. Does the state recognize implied employee contracts under employment handbooks, policies, or practices?

"Manuals and handbooks outlining an employer's policies and procedures generally are not considered part of the employment contract. Because the handbook is a unilateral statement of company policies and procedures, because its terms are not bargained for, and because no [mutual consent] occurred, we generally do not classify employee handbooks as binding agreements." *Chipman v. Nw. Healthcare Corp*., 2014 MT 15, ¶ 16, 373 Mont. 360, 365, 317 P.3d 182, 185 citing *Hubner v. Cutthroat Communs., Inc.*, 2003 MT 333, ¶ 18, 318 Mont. 421, 80 P.3d 1256 (internal quotations omitted). Montana courts will analyze whether the manual is a contract governed by general principles of Montana contract law. *Id*. Four common elements establishing the existence of a contact must exist; (1) identifiable parties capable of contracting; (2) their consent; (3) a lawful object; and (4) a sufficient cause or consideration. Mont. Code Ann. § 28-2-102. .

6. Does the state have a right to work law or other labor / management laws?

Montana does have a limited scope "right-to-work" provision under Montana Code Annotated § 39-33-101, *et seq*. However, this provision only prevents interference of union activity in retail businesses and amusement establishments which are either sole proprietorships or partnerships with two or less members.

7. What tort claims are recognized in the employment context?

"Section 39-2-913 [WDEA] bars only those tort and contract claims which are 'for discharge.'" *Solle v. W. States Ins. Agency*, 2000 MT 96, 1, 299 Mont. 237, 238, 999 P.2d 328, 329. Although the Wrongful Discharge from Employment Act bars every legal theory as to damages for wrongful termination for pain and suffering, emotional distress, compensatory damages, punitive damages, or any other form of damages, except as provided for in the Act, tort claims arising *during* employment, not related to the termination itself, are recognized.

9. Is there a common law or statutory prohibition of retaliation?

Under Montana law, employers may not retaliate for employees' refusal to violate public policy or for reporting a violation of public policy. See Mont. Code Ann. § 39-2-901. Public policy is broadly defined under the Act as "a policy… concerning the public health, safety, or welfare established by constitutional provision, statute, or administrative rule." Further, employees may not be retaliated against for opposing discriminatory employment practices (Mont. Code Ann. § 49-2-301), for exercising rights, testifying, or assisting others in exercising their rights reporting hazardous chemicals (Mont. Code Ann. § 50-78-204(4)).

10. Is the state a deferral state for charges filed with the EEOC?

Yes. In Montana, discrimination claims may be filed with either the Human Rights Bureau or the Montana Department of Labor and Industry.

Minimum Wage and Overtime - Mont. Code Ann. §§ 39-3-401 to 39-3-409.

Little Davis Bacon Act (standard prevailing wage for public contracts) - Mont. Code Ann. §§ 18-2-401 to 18-2-432.

Seats for Employees - Mont. Code Ann. § 39-2-201.

Silicosis Benefits (for workers exposed to silica dust) - Mont. Code Ann. § 39-73-101 *et. seq.*

Unemployment Insurance - Mont. Code Ann. § 39-51-101 *et. seq.*

Workers' Compensation - Mont. Code Ann. § 39-71-101 *et. seq.*

12. Is there a state statute governing paid or unpaid leaves?

Montana does not require employers to provide vacation leave, sick leave, holiday leave, voting leave, nor provide compensation for employee absences for jury duty.

Montana law provides for a reasonable leave of absence for a woman's pregnancy. Mont. Code Ann. § 49-2-310.

Medical and Family leave is allowed under the Federal Family and Medical Leave Act.

The Montana Military Service Employment Rights Act applies to Montana members of the National Guard. "A member ordered to state military duty is entitled to a leave of absence from the person's employment during the period of that state military duty. A leave of absence for state military duty may not be deducted from any sick leave, vacation leave, military leave, or other leave accrued by the member unless the member desires the deduction." Mont. Code Ann. § 10-1-1006.

13. Is there a state law governing drug-testing?

Yes. The Montana Workforce Drug and Alcohol Testing Act §§ 39-2-205 to 39-2-211, MCA, provide a statutory framework for controlled substance and alcohol testing within the scope of the employment relationship.

14. Is there a medical marijuana statute?

Yes, Mont. Code Ann. § 50-46-301 *et seq.*, titled "Montana Medical Marijuana Act" ("MMA") is essentially a "decriminalization" statute that protects individuals with debilitating medical conditions who engage in the use of marijuana. "However, the MMA does not provide an employee with an express or implied private right of action against an employer. The MMA specifically provides that it cannot be construed to require employers "to accommodate the medical use of marijuana in any workplace." *Johnson v. Columbia Falls Aluminum Co*., LLC, 2009 MT 108N, ¶ 5.

15. Is there trade secret / confidential information protection for employers?

Yes. "Everything that an employee acquires by virtue of employment, except the compensation… belongs to the employer, whether acquired lawfully or unlawfully or during or after the expiration of the term of the employee's employment." Mont. Code Ann. § 39-2-102. "An employee has a legal duty to protect an employer's trade secrets and other confidential information, and that obligation continues beyond the term of employment." *Digital Development Corp. v. Prewit*, 2009 Mont. Dist. LEXIS 671, *11 (Mont. Dist. Ct. 2009) citing *Union Pacific R. Co. v. Mower*, 219 F.3d 1069 (CA 9, 2000).

16. Is there any law related to employee's privacy rights?

"The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." Art. II, § 10 Mont. Const.

All employee personnel records are confidential and access is restricted to protect individual employee privacy except the following employee information which is considered public and must be released upon request: (a) an employee's name; (b)

position title; (c) dates and duration of employment; (d) salary; and (e) claims for vacation, holiday, or sick leave pay, except that the reason for taking leave is confidential and may not be disclosed.

Admin. R. Mont. 2.21.6615.

17. Is there any law restricting arbitration in the employment context?

Generally, arbitration agreements between employers and employees or between their respective representatives are valid and enforceable. Mont. Code Ann. § 27-5-113. However, “the violation of public interest exception pertains to the validity of the arbitration agreement, not to the merits of the underlying dispute.” *Burkhart v. Semitool, Inc.*, 2000 MT 201, ¶ 18, 300 Mont. 480, 486, 5 P.3d 1031, 1035. Often arbitration agreements are found to be contracts of adhesion which are violations of public policy. *Kloss v. Edward D. Jones & Co.*, 2002 MT 129, P 24, 310 Mont. 123, 54 P.3d 1 ("A contract of adhesion is a contract whose terms are dictated by one contracting party to another who has no voice in its formulation." (citing Arthur L. Corbin, Corbin on Contracts vol. 1, § 1.4, 13 (Joseph M. Perillo ed., rev. ed., West 1993)) *Woodruff v. Bretz, Inc.*, 2009 MT 329, ¶ 8, 353 Mont. 6, 9, 218 P.3d 486, 489.

18. Is there any law governing weapons in the employment context?

Montana does not have any laws preventing employers from limiting employees from carrying weapons in the workplace. Concealed weapons permits are required for carrying concealed weapons in cities and towns. See Mont. Code Ann. §§ 45-8-315 to 45-8-317. However, concealed permits are not required for “the carrying of arms on one's own premises or at one's home or place of business” *Id*. at (j).

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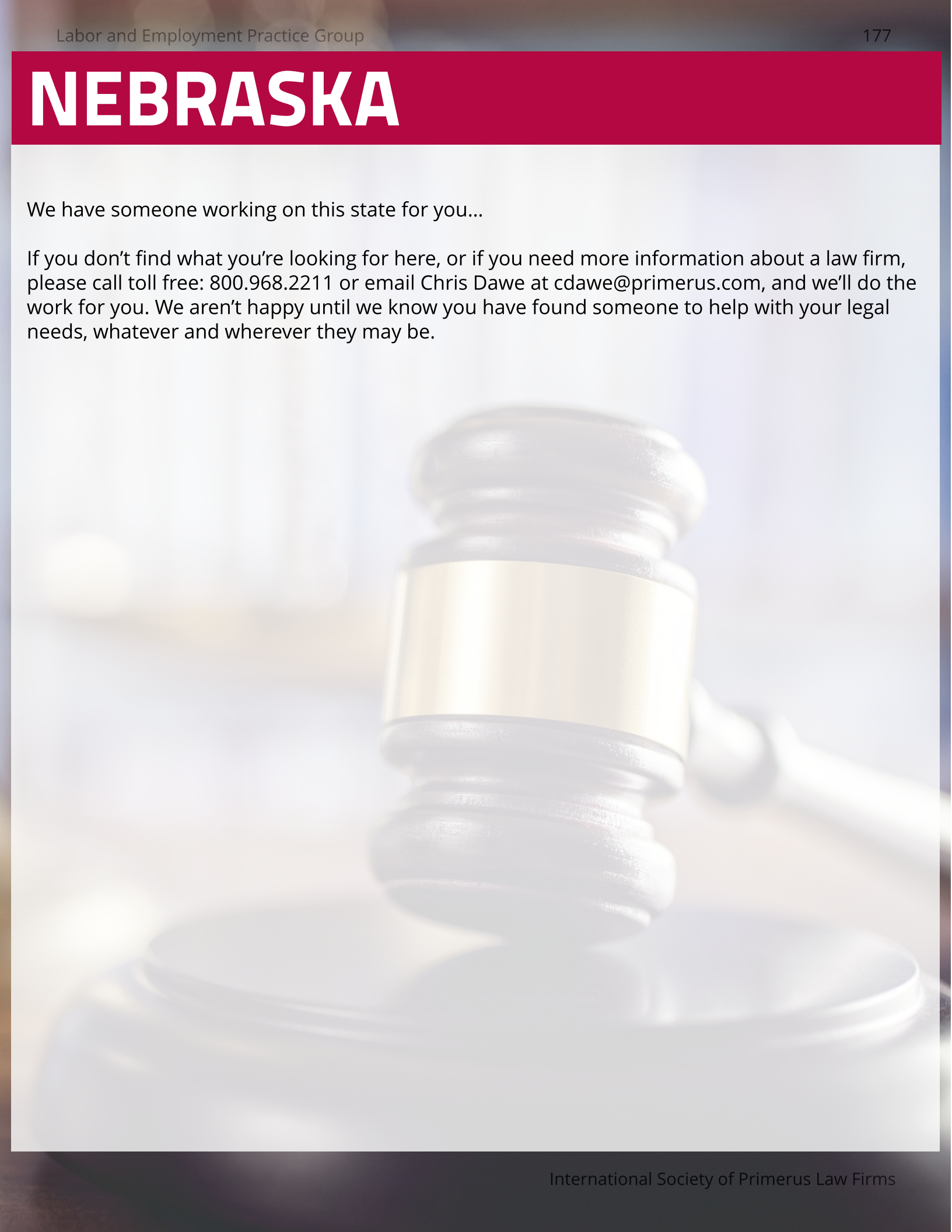

NEVADA

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The 2019 Nevada Legislative Session has resulted in a number of upcoming amendments to Nevada employment law statutes which, at the time of this writing, have not yet gone into effect. Readers are urged to check the statutes cited in this section for subsequent applicable amendments, and to also consider whether such amendments may impact the precedential effect of judicial decisions cited herein.

1. Is the state generally an employment-at-will state?

All employees in Nevada are presumed to be at-will employees.[i] An at-will employee may be fired with or without cause.[ii] "An employee may rebut this presumption by proving by a preponderance of the evidence that there was an express or implied contract between his employer and himself that his employer would fire him only for cause."[iii]

[i] Am. Bank Stationery v. Farmer, 799 P.2d 1100, 1101-02 (Nev. 1990).

[ii] Bally's Grand Emps.' Credit Union v. Wallen, 779 P.2d 956, 957 (Nev. 1989).

[iii] *Am. Bank*, 799 P.2d at 1101-02 (citing *Wallen,* 779 P.2d at 957).

2. Are there any statutory or public policy exceptions to the employment-at-will doctrine?

In Nevada, an employer may not fire an employee if the firing would violate the state's public policies (e.g., against discrimination) or a state or federal statute.[i] Nevada's prohibition of discriminatory acts, such as discrimination on the basis of race, color, religion, sex, sexual orientation, gender identity or expression, age, disability or national origin, can be found at Nevada Revised Statutes Chapter 613. (*See infra* Part 7).

IMPLIED EMPLOYMENT CONTRACTS

The Nevada Supreme Court recognizes implied employment contracts.[ii] The presumption is that an employee is hired at-will; however, an employee may rebut this presumption by providing evidence that there was an implied employment contract and he or she could only be fired for cause.[iii] An employee's subjective expectations are insufficient to transform an at-will relationship to a contract of termination only for just cause.[iv] In order to rebut the presumption of at-will employment, the employee seeking an implied employment contract must provide evidence "that would lead a reasonable person [in the employee's] position to believe that if he accepted the job he could only be fired for good cause."[v] In *American Bank*, the court found the following evidence offered by the employee justified a finding of an implied employment contract:

> First, when McDonald (the hiring authority for ABS) offered Farmer a job at ABS he told him that if he did his job adequately he would keep his job but if he did not perform well he would be fired. He added "That's the way American Bank Stationery operates." This language is part of an offer which includes an explicit promise by ABS to keep Farmer as an employee if he performed adequately. Alternatively, the language also indicates that Farmer's continued employment was subject to a condition subsequent, namely, that if Farmer failed to perform adequately, ABS could fire him.
>
> Additionally, when offering Farmer a job at ABS, McDonald reviewed an employee handbook with Farmer. This handbook set forth reasons for which an employee could be terminated by ABS. The handbook stated that an employee could be discharged only for cause. McDonald believed that the policies in the handbook applied to Farmer. He discussed the handbook with Farmer extensively, asked him to read it in front of him, and strongly implied that the handbook applied to Farmer. Since it was made contemporaneously with the express oral promise, McDonald's reference to the handbook further strengthens the argument that ABS made an express oral agreement with Farmer that it would only fire him for cause. The handbook became a part of the oral contract between Farmer and ABS when McDonald indicated that it

applied to Farmer.[vi]

[i] *See* Vancheri v. GNLV Corp., 777 P.2d 366, 369 (Nev. 1989) (An employer can dismiss an at-will employee with or without cause, so long as the dismissal does not offend a public policy of this state.)

[ii] *Am. Bank*, 799 P.2d at 1102.

[iii] *Id.*

[iv] *Wallen*, 779 P.2d at 957 (citing *Vancheri*, 777 P.2d at 369).

[v] *Am. Bank*, 799 P.2d at 1102.

[vi] *Id.*: Right to trial by jury is available. *Simonsen v. Hendricks Sodding & Landscaping*, 5 Neb.App. 263, 558 N.W.2d 825 (1997).

3. Is there any law related to the hiring process?

It is unlawful in Nevada for an employer to use a lie detector on an employee or prospective employee.[i] An employer who violates NRS 613.480 is liable to the employee or prospective employee for any legal or equitable relief, "including employment of a prospective employee, reinstatement or promotion of an employee and payment of lost wages and benefits."[ii] A court may also award reasonable costs to the prevailing party, including attorney's fees.[iii]

It is unlawful for an employer to require or request an employee or prospective employee's user name and password for "social media accounts."[iv] "'[S]ocial media account' means any electronic service or account or electronic content, including, without limitation, videos, photographs, blogs, video blogs, podcasts, instant and text messages, electronic mail programs or services, online services or Internet website profiles."[v]

Nevada law prohibits an employer from requesting any employee or prospective employee to submit to a credit report as a condition of employment, with some exceptions.[vi] The exceptions to NRS 613.570 are as follows:

1. The employer is required or authorized, pursuant to state or federal law, to use a consumer credit report or other credit information for that purpose;

2. The employer reasonably believes that the employee or prospective employee has engaged in specific activity which may constitute a violation of state or federal law; or

3.The information contained in the consumer credit report or other credit information is reasonably related to the position for which the employee or prospective employee is being evaluated for employment, promotion, reassignment or retention as an employee. The information in the consumer credit report or other credit information shall be deemed reasonably related to such an evaluation if the duties of the position involve:

(a) The care, custody and handling of, or responsibility for, money, financial accounts, corporate credit or debit cards, or other assets;

(b) Access to trade secrets or other proprietary or confidential information;

(c) Managerial or supervisory responsibility;

(d) The direct exercise of law enforcement authority as an employee of a state or local law enforcement agency;

(e) The care, custody and handling of, or responsibility for, the personal information of another person;

(f) Access to the personal financial information of another person;

(g) Employment with a financial institution that is chartered under state or federal law, including a subsidiary or affiliate of such a financial institution; or

(h) Employment with a licensed gaming establishment, as defined in NRS 463.0169.[vii]

An employer who violates NRS 613.570 is liable to the employee or prospective employee for any legal or equitable relief, "including employment of a prospective employee, reinstatement or promotion of an employee and payment of lost wages and benefits."[viii] A court may also award reasonable costs to the prevailing party, including attorney's fees.[ix]

It is an unlawful employment practice for an employer to refuse to hire a potential employee because the potential employee engages in a lawful activity that is outside the employer's premises and done during nonworking hours, so long as that lawful activity does not affect the potential employee's ability to perform his or her job or the safety of other employees.[x] A potential employee who has been discriminated against based on his or her lawful use of a product may bring a civil action and may recover lost wages, an order directing the employer to offer employment to the potential employee, and for damages equal to

lost wages.[xi] The court shall make an award of reasonable costs and attorney's fees to the prevailing party.[xii]

[i] Nev. Rev. Stat. § 613.480(1).

[ii] *Id.* § 613.490(1).

[iii] *Id.* § 613.490(3). [iv] Nev. Rev. Stat. § 613.135(1)(a).

[v] *Id.* § 613.135(4).

[vi] Nev. Rev. Stat. § 613.570(1).

[vii] *Id.* § 613.580(1)-(3).

[viii] *Id.* § 613.590(1).

[ix] *Id.* § 613.590(3).

[x] Nev. Rev. Stat. § 6113.333(1)(a).

[xi] *Id.* § 613.333(2)(a), (c), (d).

[xii] *Id.* § 613.33(3).

4. Does the state recognize implied employee contracts under employment handbooks, policies, or practices?

An employee handbook explaining a company's policies regarding termination standing alone will not transform an at-will relationship into one for termination only for just cause.[i] The written handbook can be used to support a claim that an oral contract existed between an employee and employer that the employee may only be fired for just cause.[ii]

[i] Am. Bank Stationery v. Farmer, 799 P.2d 1100, 1101-02 (Nev. 1990).

[ii] *Id.*

5. Does the state have a right to work law or other labor / management laws?

Nevada has adopted "right to work" policies.[i] Nevada law provides that no person shall be denied employment or terminated from his or her employment based on that person's non-membership in a "labor organization."[ii] "Labor organization" is defined to mean "any organization of any kind, or any agency or employment representation committee or plan, in which employees participate and which exits for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment."[iii] Nevada's "right to work" laws also prohibit any labor organization or agent on behalf of a labor organization from striking or picketing to force an employer to deny employment to a person based on his or her non-membership in a labor organization.[iv] Nevada's "right to work" laws make it unlawful for any labor organization or agent to compel or attempt to compel any person to join a labor organization against that person's will "or to leave employment by any threatened or actual interference with his or her person, immediate family or property."[v] Any person who violates Nevada's "right to work" laws may be liable to the person "injured" and the injured party may seek injunctive relief.[vi]

[i] Nev. Rev. Stat. § 613.250.

[ii] *Id.*

[iii] *Id.* § 613.230.

[iv] *Id.* § 613.260.

[v] *Id.* § 613.270.

[vi] *Id.* § 631.290-.300.

6. What tort claims are recognized in the employment context?

Nevada law recognizes two torts related to the employment context; bad faith discharge tort and tortious discharge.[i] Bad faith discharge tort "is committed when an employer, acting in bad faith, discharges an employee who has established contractual rights of continued employment and who has developed a relationship of trust, reliance and dependency with the employer."[ii] This tort may only be established when the employee has established that he or she has an employment contract.[iii] Tortious discharge is a public policy tort and occurs when an employee is terminated for reasons which violated public policy.[iv] Tortious discharge "is not dependent upon or directly related to a contract of continued employment."[v] Examples of tortious

discharge include “an employee seeking industrial insurance benefits, for performing jury duty or for refusing to violate the law….”[vi]

The tort of intentional infliction of emotional distress is recognized in the employment termination context in Nevada.[vii] “The elements of a cause of action for intentional infliction of emotional distress are: ‘(1) extreme and outrageous conduct with either the intention of, or reckless disregard for causing emotional distress, (2) the plaintiff’s having suffered severe or extreme emotional distress and (3) actual or proximate causation.’”[viii]

It is unlawful for a company to influence a worker to change from one employer to another through means of false or deceptive representation, false advertising, or false pretenses.[ix] An employee who has been the victim of NRS 613.010 may bring a cause of action and the employer may be liable for damages the employee has suffered.[x] The court may award costs and attorney’s fees to the prevailing party.[xi] Additionally, an employer who violates NRS 613.010 is guilty of a gross misdemeanor.[xii] It is also a misdemeanor for an employer to make a false representation to an employee concerning the employer’s ability to pay the employee his or her agreed upon wages.[xiii]

A former employee may bring a defamation claim against his or her former employer for any defamatory claim made by the former employer to a potential employer. Nevada recognizes the “common interest privilege” as a defense to a defamation action in such situations.[xiv] “The common interest privilege is conditional and ‘exists where a defamatory statement is made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or a duty, if it is made to a person with a corresponding interest or duty.’”[xv] The common interest defense applies as a qualified privilege to any suit where a false statement is a required element.[xvi] “A former employer has a qualified or conditional privilege to make otherwise defamatory communications about the character or conduct of former employees to present or prospective employers, as they have a common interest in the subject matter of the statements.”[xvii] “A conditional privilege may be abused by publication in bad faith, with spite or ill will or some other wrongful motivation toward the plaintiff, and without belief in the statement’s probable truth.”[xviii] If the statement made by a former employer is opinion, then no defamatory action may be brought by the former employee as statements of opinion are protected by the U.S. Constitution.[xix]

[i] D’Angelo v. Gardner, 819 P.2d 206, 211-12 (Nev. 1991).

[ii] *Id.* at 211.

[iii] *Id.* at 211-12.

[iv] *Id.* at 212.

[v] *Id.* (quotation marks and citation omitted).

[vi] *D’Angelo*, 819 P.2d at 212.

[vii] Shoen v. Amerco, Inc., 896 P.2d 469, 476 (Nev. 1995).

[viii] *Id.* (quoting Star v. Rabello, 625 P.2d 90, 91-92 (1981)).

[ix] Nev. Rev. Stat. § 613.010(1).

[x] *Id.* § 613.010(3).

[xi] *Id.*

[xii] *Id.* § 613.010(2).

[xiii] *Id.* § 613.030.

[xiv] Lubin v. Kunin, 17 P.3d 422, 425 (Nev. 2001).

[xv] *Id.* at 428 (quoting Circus Circus Hotels v. Witherspoon, 657 P.2d 101, 105 (Nev. 1983)).

[xvi] Bank of Am. Nev. v. Bourdeau, 982 P.2d 474, 476 (Nev. 1999).

[xvii] *Witherspoon*, 657 P.2d at 106 n.3.

[xviii] *Id.* at 105 n.2.

[xix] *Lubin*, 17 P.3d at 426. “The test for whether a statement constitutes fact or opinion is: ‘whether a reasonable person would be likely to understand the remark as an expression of the source’s opinion or as a statement of existing fact.’” *Id*. (quoting Nev. Ind. Broad. v. Allen, 664 P.2d 337, 341-42 (Nev. 1983)).

7. Is there a common law or statutory prohibition against discrimination / hostile work environment?

Nevada law prohibits an employer from failing to hire or from discharging an employee based on his or her "race, color, religion, sex, sexual orientation, gender identity or expression, age, disability or national origin…."[i] This discrimination prohibition applies to employers, employment agencies, labor organizations, and joint labor-management committee controlling apprenticeship or other training or retraining programs.[i] Additionally, it is unlawful for an employer to "limit, segregate or classify an employee in a way which would deprive or tend to deprive the employee of employment opportunities or otherwise adversely affect his or her status as an employee, because of his or her race, color, religion, sex, sexual orientation, gender identity or expression, age, disability or national origin."[ii] Again, this prohibition also applies to labor organizations, employment agencies, or joint labor-management committees.[iii] Nevada law prohibits "any employer, employment agency, labor organization or joint labor-management committee to discriminate against a person with a disability by interfering, directly or indirectly, with the use of an aid or appliance, including, without limitation, a service animal, by such a person."[iv]

Nevada law provides for exceptions to NRS 613.330. Nevada law provides that it is not an unlawful employment practice for an employer to hire an employee on the basis of his or her religion, sex, sexual orientation, gender identity or expression, age, disability, or national origin where religion, sex, sexual orientation, gender identity or expression, age, physical, mental or visual condition, or national origin "is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[v] It is also lawful for an employer to refuse to hire an employee based on a disability where the "physical, mental or visual condition is a bona fide and relevant occupational qualification necessary to the normal operation of that particular business or enterprise, if it is shown that the particular disability would prevent proper performance of the work for which the person with a disability would otherwise have been hired…"[vi] Nevada's prohibition against age discrimination does not apply to employees or potential employees who are under the age of forty.[vii] It is not unlawful for a school or other educational institution to hire employees of a "particular religion if the school or institution is, in whole or in part, owned, supported, controlled or managed by a particular religion or by a particular religious corporation, association or society, or if the curriculum of the school or institution is directed toward the propagation of a particular religion."[viii] Finally, an employer may require reasonable workplace appearance, but an employer must allow an employee to "dress consistent with the employee's gender identity or expression."[ix]

If an employer grants leave, with or without pay, to employees for sickness, disability, or other medical conditions, the employer must allow female employees to use those benefits for the female employee's pregnancy.[x]

Nevada law allows a private employer to adopt policies that give veterans and veterans' spouses preferential treatment, so long as that policy is applied uniformly.[xi]

An employee who claims that he or she has been discriminated based on his or her race, color, sex, sexual orientation, gender identity or expression, age, disability, religion, national origin, or any other violation of NRS 613.310-.435, inclusive, may file a complaint with the Nevada Equal Rights Commission.[xii] If the Nevada Equal Rights Commission finds that the employer did not discriminate on an unlawful basis, the employee may apply to the district court for an order granting or restoring the employee's rights.[xiii] The application to the district court must be made within 180 days after the alleged discrimination, unless the employee files their claim with the Nevada Equal Rights Commission, which tolls the limitations period.[xiv]

[i] *Id.* § 613.330(1)-(4).

[ii] *Id.* § 613.330(1)(b).

[iii] *Id.* §613.330(2)-(4).

[iv] *Id.* § 613.330(5).

[v] Nev. Rev. Stat. § 613.350(1).

[vi] *Id.* § 615.350(2).

[vii] *Id.* § 613.650(3).

[viii] *Id.* § 615.350(4).

[ix] *Id.* § 613.650(6).

[x] Nev. Rev. Stat. § 613.335.

[xi] Nev. Rev. Stat. § 613.385(1).

[xii] Nev. Rev. Stat. § 613.405.

[xiii] *Id.* § 613.420.

[xiv] *Id.* § 613.430.

8. Is there a common law or statutory prohibition of retaliation?

Nevada law makes it unlawful for an employer to discriminate against any employee or applicant for employment because the employee or applicant opposed a practice outlawed in NRS 613.330 or because the employee or applicant made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing to determine whether the employer violated NRS 613.330.[i] An employee who brings a claim for a violation of NRS 613.340 must file his or her claim with the Nevada Equal Rights Commission and follow the procedures outlined by the Commission.[ii]

It is unlawful for an employer to discriminate or fire an employee who testifies or assists in any investigation regarding a dispute as to the payment of wages, compensation, or hours.[iii]

An employer may not discharge, discipline, discriminate, deny employment, or threaten in any way an employee who files a compliant, testifies, or assisted another in reporting an improper use of a lie detector test against an employee.[iv] An employer who violates NRS 613.480(3) may be liable for any legal or equitable relief, including reinstatement or promotion of an employee and the payment of lost wages.[v] A cause of action brought pursuant to NRS 613.480 must be brought within three years of the alleged violation.[vi] A prevailing party who is discriminated against pursuant to NRS 613.480 may be awarded reasonable costs and attorney's fees.[vii]

An employee who files any compliant or instituted a cause of action regarding improper methods under Nevada's occupational safety and health laws may not be discriminated against or discharged on account of the complaint.[viii] An employee who claims that he or she was discriminated against because of his or her report may file a complaint with the Division of Industrial Relations of the Department of Business and Industry.[ix] Upon investigating the claim made by the employee, the Administrator of the Division of Industrial Relations may bring a claim in district court against the employer who discriminated against the employee and the court may reinstate the employee and provide his or her lost wages and work benefits.[x]

A medical facility or any agent of the facility may not retaliate or discriminate "unfairly" against an employee who makes a "good faith" report to the Nevada Board of Medical Examiners or the State Board of Osteopathic Medicine regarding the conduct of a doctor, reports a sentinel event pursuant to NRS 439.835, or assists in an investigation by the Nevada Board of Medical Examiners, Nevada Board of Osteopathic Medicine, or other governmental entity investigating such conduct.[xi] Good faith, as used in the section, "means honesty in fact in the reporting of the information or in the cooperation in the investigation concerned."[xii] An employee who has been discriminated against in violation of NRS 449.205 may file a complaint in any court of competent jurisdiction.[xiii] If a court finds that an employer has violated NRS 449.205, the court may award compensatory damages, reimbursement of any wages, attorney's fees and costs, and punitive damages if the facts warrant such an award.[xiv] The court may also order that the employee be reinstated or it may order such other equitable relief as the court finds fit.[xv] Nevada law also provides that if an employer takes any retaliatory action within 60 days of the employee reporting a violation, there is a rebuttable presumption that the action taken by the employer is a violation of NRS 449.205.[xvi] Any claim by an employer brought under this section must be brought within two-years after the last event constituting the alleged violation.[xvii]

Nevada law makes it an unlawful employment practice to terminate an employee because he or she engages in the lawful use of a product outside of his or her place of employment during non-work hours, if the use of that product does not adversely affect the employee's ability to perform his or her job or the safety of other employees.[xviii] An employee who is terminated in violation of NRS 613.333(1)(b) may bring a civil action for lost wages, for an order reinstating the employee, and for damages equal to the amount of lost wages.[xix] The prevailing party may also recover reasonable costs and attorney's fees.[xx]

An employee may not establish a rule preventing any employee from engaging in politics or from being a candidate for public office.[xxi] Any employer found to have violated NRS 613.040 may be punished by a fine of no more than $5,000 and it is the Nevada Attorney General that must commence a suit to recover the fine.[xxii] An employee may bring an action for damages against an employer who violated NRS 613.040.[xxiii]

It is unlawful for an employee to terminate an employee who is a member of the Nevada National Guard because the employee assembles for training, participates in filed training, or active duty, or is ordered to active service or duty.[xxiv] An employee who violates NRS 412.139 is guilty of a misdemeanor and a penalty of not more than $5,000 shall be imposed, in addition to any other remedy or penalty imposed.[xxv] Any employee who believes he or she was terminated in violation of NRS 412.139 may request a hearing before the Nevada Labor Commissioner within 60 days of his or her termination.[xxvi] If the terminated employee establishes that he or she was terminated in violation of NRS 412.139, he or she may be immediately reinstated to his or her position and receive all wages and benefits lost as a result of the unlawful termination.[xxvii]

An employee may not be terminated by his or her employer if the employee is absent due to voting.[xxviii] NRS 293.463

provides that an employee may be absent from his or her place of employment for a period of time to vote, if it is impracticable for the voter to vote before or after his or her hours of employment.[xxix] If an employee establishes that it is impracticable to vote before or after work, the employee is provided a sufficient time to vote as follows: (a) if the distance between the employee's polling place and place of employment is 2 miles or less, the employee is given 1 hour of leave; (b) if the distance is more than 2 miles but less than 10 miles, the employee is given 2 hours to vote; and (c) if the distance is more than 10 miles, the employee is given 3 hours to vote.[xxx] The employee must give his or her employer notice prior to the date voting is to take place.[xxxi] If an employee denies a request to vote by an employee or terminates an employee because of an absence due to voting, the employer is guilty of a misdemeanor.[xxxii]

Nevada law makes it unlawful to terminate an employee who is a juror or who has received a summons to appear for jury duty.[xxxiii] Additionally, NRS 6.190(1) makes it unlawful for an employer to threaten an employee that he or she will lose her employment as a consequence of serving as a juror or prospective juror.[xxxiv] An employee terminated based on his or her service as a juror or potential juror may bring a civil action against his or her employer and may recover lost wages and benefits, an order of reinstatement, damages equal to lost wages, reasonable attorney's fees, and punitive damages up to $50,000.[xxxv] Upon receiving the summons for jury duty, the employee will receive a notice to be given to the employer informing the employer that the employee has been summoned for jury duty.[xxxvi] The notice must be given to the employer at least three days before the employee is to appear for jury duty.[xxxvii]

Nevada law provides protection for state employees who act as whistle blowers for "improper government actions."[xxxviii] "Improper government action" is defied to mean:

[A]ny action taken by a state officer or employee or local governmental officer or employee in the performance of the officer's or employee's official duties, whether or not the action is within the scope of employment of the officer or employee, which is:

(a) In violation of any state law or regulation;

(b) If the officer or employee is a local governmental officer or employee, in violation of an ordinance of the local government;

(c) An abuse of authority;

(d) Of substantial and specific danger to the public health or safety; or

(e) A gross waste of public money.[xxxix]

Government employees or officers, either state or local, may not use their authority to influence or threaten another state or local employee to prevent that employee from disclosing improper governmental action.[xl] If any act of reprisal or retaliation is taken against a state employee who disclosures improper governmental action, the employee may file a written appeal with a hearing officer of the Nevada Personnel Commission for a determination whether the action was one of reprisal or retaliation.[xli] In order for a claim to be filed, the alleged act of reprisal or retaliation must take place within two years after the employee made a disclosure of improper governmental action.[xlii] "If the hearing officer determines that the action taken was a reprisal or retaliatory action, the hearing officer may issue an order directing the proper person to desist and refrain from engaging in such action."[xliii] Local governments are required to create their own procedures for hearing an appeal from a local employee who believes that any act of reprisal or retaliation was taken against him or her based on his or her disclosure f improper governmental action.[xliv]

The Nevada Supreme Court has adopted the majority stance that terminating an at-will employee as retaliation for filing a workers' compensation claim is against public policy and is an actionable tort.[xlv] The Nevada Supreme Court has also recognized that firing an at-will employee who refuses to work under conditions that are unreasonably dangerous constitutes a tortious discharge.[xlvi]

The Nevada Supreme Court has also adopted the position that "[a] claim for tortious discharge should also be available to an employee who was terminated for refusing to engage in conduct that he, in good faith, believed to be illegal."[xlvii] The rule in *Allum* also applies to employees who report illegal activity.[xlviii] In order for an employee to be protected for reporting illegal activity, the employee must report the activity to the proper authorities.[xlix] If the employee only reports the illegal activity to someone in his or her company, the employee is not protected and may be discharged by the employer.[l] The protection afford an employee apply even if it turns out that the employee was incorrect, so long as the employee had a good faith belief that the activity was illegal.[li]

[i] Nev. Rev. Stat. § 613.340. The Nevada Supreme Court has held that an employer did not violate NRS 613.340 when it fired an employee whose husband made a claim of discrimination when the discharged employee did not assist in the filing or investigation of her husband's discrimination claim. Pope v. Motel 6, 114 P.3d 277, 282 (Nev. 2005).

[ii] *Id.* § 613.405.

[iii] Nev. Rev. Stat. § 608.015.

[iv] Nev. Rev. Stat. § 613.480(4).

[v] *Id.* § 613.490(1).

[vi] *Id.* § 613.490(2).

[vii] *Id.* § 613.490(3).

[viii] Nev. Rev. Stat. § 618.445(1).

[ix] *Id.* § 618.445(2).

[x] *Id.* § 618.445(3), (4).

[xi] Nev. Rev. Stat. § 449.205(1)(a).

[xii] *Id.* § 449.205(4)(a).

[xiii] *Id.* § 449.207.

[xiv] *Id.* § 449.207(2).

[xv] *Id.* § 449.207(4).

[xvi] *Id.* § 449.207(5).

[xvii] *Id.* § 449.207(7).

[xviii] Nev. Rev. Stat. § 613.333(1)(b).

[xix] *Id.* § 6133.333(2)(a), (b), (d).

[xx] *Id.* § 613.333(3). *See* Riddle v. Washington, No. 2:07-cv-01127-RCJ-VCF, 2012 WL 3135381, at *5 (D. Nev. Aug. 1, 2012) (finding that "[c]ity may legitimately prohibit its employees from smoking [cigarettes] in city vehicles [,even if smoking in vehicle occurred during non-work hours,] without running afoul of [NRS] § 613.333) (relying on Miners v. Cargill Commc'ns, Inc., 113 F.3d 820, 824 (8th Cir. 1997)).

[xxi] Nev. Rev. Stat. § 613.040.

[xxii] *Id.* § 613.050(1), (2).

[xxiii] *Id.* § 613.070.

[xxiv] Nev. Rev. Stat. § 412.139(1).

[xxv] *Id.* § 412.139(3)

[xxvi] *Id.* § 412.1393.

[xxvii] *Id.* § 412.1395.

[xxviii] Nev. Rev. Stat. § 293.463(2).

[xxix] *Id.* § 293.463(1)

[xxx] *Id.*

[xxxi] *Id.* § 293.463(3).

[xxxii] *Id.* § 293.463(4).

[xxxiii] Nev. Rev. Stat. § 6.190(1).

[xxxiv] *Id.*

[xxxv] *Id*. § 6.190(2).

[xxxvi] *Id.* § 6.190(4).

[xxxvii] *Id.*

[xxxviii] Nev. Rev. Stat. §§ 281.611-.671.

[xxxix] *Id.* § 281.611(1).

9. Is the state a deferral state for charges filed with the EEOC?

Nevada is a deferral state and the Nevada Equal Rights Commission enforces Nevada's discrimination laws.[i] Because Nevada is a deferral state, an employee has 300 days to file their charges with the EEOC if the employee first institutes proceedings with the Nevada Equal Rights Commission.[ii] The 300 day time-limit begins to run when the employee is terminated from his or her employment.[iii] Nevada has entered into a "worksharing" agreement with the EEOC.[iv] A "worksharing" agreement means that the EEOC and the state agency agree to cooperate in the processing of discrimination claims and whenever a claim is filed in Nevada, the claim is also considered filed and received by the EEOC.[v]

[i] Laquaglia v. Rio Hotel & Casino, Inc., 186 F.3d 1172, 1174 (9th Cir. 1999).

[ii] *Id.*

[iii] Sanchez v. P. Powder Co., 147 F.3d 1097, 1099 (9th Cir. 1998).

[iv] *Laguaglia*, 186 F.3d at 1175.

[v] *Sanchez*, 147 F.3d at 1099.

10. Are there any state laws related to compensation, including wage and hour, paid time off, mandatory breaks, fringe benefits, allowable deductions, prevailing wage rates for public contracts, etc.?

Nevada's minimum wage is regulated by the Nevada Constitution.[i] The minimum wage is based on the federal minimum wage and additional increases are based on cost of living calculations based on the Consumer Price Index.[ii] The Nevada Constitution requires the Governor or state agency in charge of labor to publish a bulletin every April 1st, with the applicable minimum wage for the next year.[iii] In Nevada, the current minimum wage is $7.25 for employees whose employers provide health benefits and $8.25 to employees who don't receive health benefits.[iv] Any hours worked over the standard forty hour work week are considered overtime hours and employers must pay employees time and a half for such overtime hours.[v] Nevada employers are also obligated to pay employees overtime if they work more than eight hours in a day.[vi] NRS 608.018(1) only applies to employees that are making less than one and a half times the minimum wage.[vii] For employees making more than one and a half times minimum wage, employees are only paid an overtime rate when he or she works more than forty hours in one week.[viii] Nevada law requires that an employer provide one thirty minute break to any employee who works eight hours.[ix] Additionally, each employer must provide an employee a paid ten minute break for every four hours of work.[x] Employees must be paid at least twice a month.[xi] Payment of wages must be made in the form of money or by a negotiable check, unless the employer and employee agree to a different form of payment in writing.[xii] If an employee brings a suit for unpaid wages against his or her employer and prevails in his or her suit against the employer, the court shall award reasonable attorney's fees in addition to the amount for unpaid wages.[xiii] The employee must make a demand in writing to his or her employee five days before filing suit in order to obtain attorney's fees.[xiv] Nevada law provides for prevailing wage rates for public contracts.[xv] Every contract that a state agency is a party to must provide the wages to be paid to "workers" in writing and those wages cannot be less than the prevailing wage amount in the county where the work is located.[xvi] The term "worker" is defined to mean "a skilled mechanic, skilled worker, semiskilled mechanic, semiskilled worker or unskilled worker in the service of a contractor or subcontractor under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawful or unlawfully employed."[xvii] The Nevada Labor Commissioner determines the wage rate for public contracts for each county in the state.[xviii]

[i] Nev. Const. art. XV, § 16.

[ii] *Id.* § 16(a).

[iii] *Id.*

[iv] Nev. Dep't of Bus. & Indus., *State of Nevada Minimum Wage 2017 Annual Bulletin* (2017), *available at http://labor.nv.gov/uploadedFiles/labornvgov/content/About/Forms/2017%20Annual%20Bulletin%20-%20Minimum%20Wage.pdf.*

[v] Nev. Rev. Stat. § 608.018(1).

[vi] *Id.*

[vii] *Id.*

[viii] *Id.* § 608.018(2).

[ix] Nev. Rev. Stat. § 608.019(1).

[x] *Id.*

[xi] Nev. Rev. Stat. § 608.060.

[xii] *Id.* § 608.120.

[xiii] *Id.* § 608.140.

[xiv] *Id.*

[xv] Nev. Rev. Stat. § 338.020(1).

[xvi] *Id.* § 338.020(1)(a).

[xvii] *Id.* § 338.010(23).

[xviii] *Id.* § 338.330(2)(a).

11. Is there a state statute governing paid or unpaid leaves?

Nevada has not passed any legislation regarding the regulation or restriction of drug testing for private employment. Nevada does have a detailed procedure for the drug testing of public employees. A state agency may request that an employee take a "screening test" if it reasonably believes that the employee is under the influence of alcohol or drugs which are impairing the employee's ability to perform his or her duties.[i] The state agency must inform the employee of the specific facts supporting its belief that the employee is impaired and inform the employee in writing whether the test is for drugs or alcohol, or both; that the results are inadmissible for criminal proceedings; and that the employee my refuse to take the test, but the employee may be terminated for his or her refusal.[ii] A state agency may also request a screening test of an employee if the employee is a law enforcement officer who has fired his or her weapon, other than for reasons of an accident; if any employee, while on duty, is in a motor vehicle accident that causes bodily injury to any person or substantial property damage; or if any employee is involved in a work-related accident, motor vehicle crash or injury.[iii] "Screening test" is defined to mean a breath or blood test to determine the presence of alcohol or a urine test to detect the presence of a controlled substance or any other drug, both of which could impair a person's ability to perform the duties of employment.[iv]

A state agency may request an applicant to take a screening test for any position that affects public safety.[v] An employee may not be hired for a position that affects the public safety unless he or she undergoes a screening test.[vi] If a screening test shows that the applicant has a controlled substance other than marijuana in their body, that applicant may not be hired.[vii]

[i] Nev. Rev. Stat. § 284.4065(1)(a).

[ii] *Id.* § 284.065(1)(b)-(c).

[iii] *Id.* § 284.4065(2).

[iv] *Id.* § 284.0461(2).

[v] Nev. Rev. Stat. § 284.4066(1).

[vi] *Id.*

[vii] *Id.* § 284.4066(2).

12. Is there a medical marijuana statute?

Nevada law provides for the use of marijuana for both medical and recreational purposes. Nev. Rev. Stat. Ch. 453A (medical marijuana); Nev. Rev. Stat. Ch. 453D (recreational marijuana). NRS Ch. 453A provides that an employer is not required to modify the job or working conditions of a person who holds a medical marijuana card that are based on the "reasonable business purposes of the employer…."[i] An employer must make "reasonable accommodations for the medical needs of an employee who" holds a medical marijuana card, provided that the reasonable accommodations do not pose a threat of harm or danger to person or property or impose an undue hardship on the employer or prohibit the employee from fulfilling all of his or her job duties.[ii] This requirement does not apply to law enforcement agencies.[iii]

Nevada recreational marijuana laws were passed in 2016. NRS Ch. 453D provides that the act does not prohibit a "public or private employer from maintaining, enacting, and enforcing a workplace policy prohibiting or restricting actions or conduct otherwise permitted under this chapter…."[iv]

[i] Nev. Rev. Stat. § 453A.800(3).

[ii] *Id.*

[iii] *Id.* § 453A.800(4).

[iv] Nev. Rev. Stat. § 453D.100(2)(a).

13. Is there trade secret / confidential information protection for employers?

Nevada has adopted the Uniform Trade Secrets Act.[i]

Trade secret means information, including, without limitation, a formula, pattern, compilation, program, device, method, technique, product, system, process, design prototype, procedure, computer programming instruction that:

> (a) Derives independent economic value, actual or potential , from not being generally known to, and not being readily ascertainable by proper means by the public or any other persons who can obtain commercial or economic value from its disclosure or use ; and
>
> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[ii]

The Uniform Trade Secret Act makes it a category C felony for a person who, with intent to injure an owner of a trade secret or with reason to believe his or her actions will injure an owner of a trade secret, steals, misappropriates, takes or conceals a trade secret through fraud or deception; wrongfully copies or photographs a trade secret; or receives or buys a trade secret with knowledge or reason to know that the trade secret was wrongfully obtained.[iii] An owner of a trade secret may seek an injunction to stop the actual or threatened misappropriation of the trade secret.[iv] "Except to the extent that a material and prejudicial change of position before acquiring knowledge or reason to know of misappropriation renders a monetary recovery inequitable, a complainant is entitled to recover damages for misappropriation. Damages include both loss caused by misappropriation and unjust enrichment caused by misappropriation that is not taken into account in computing the loss."[v] Attorney's fees may be awarded to a prevailing party if a claim is made in bad faith, an injunction is made or resisted in bad faith, or willful and malicious misappropriation exists.[vi]

[i] Nev. Rev. Stat. Ch. 600A.

[ii] Nev. Rev. Stat. § 600A.030(5).

[iii] *Id.* § 600A.035(1)-(3).

[iv] *Id.* § 600A.040(1).

[v] *Id.* § 600A.050(1).

[vi] *Id.* § 600A.060.

14. Miscellaneous employment or labor laws not discussed above?

If an employee quits employment, the employer must pay the employee within seven calendar days or by the next regular pay day, whichever is earlier.[i] If the employee is discharged, an employer must pay the employee his or her unpaid wages

immediately.[ii] If an employer fails to pay a discharged employee within three days of the discharge, the wages of the employee continue at the same rate from the date the employee was discharged until the employee is paid or for thirty days, whichever is less.[iv] An employee may not receive additional payment of wages if he or she avoids payment or refuses to accept the full amount tendered to him or her.[v]

Nevada law provides that it is unlawful for a former employer to do anything willfully that is intended to prevent a former employee from gaining employment in Nevada.[vi] An employer who violates NRS 613.200 is guilty of a gross misdemeanor and shall be punished by a fine of not more than $5,000.[vii] NRS 613.200 provides that a former employer may legally interfere or prohibit a former employee's employment when there is an agreement which prohibits the employee from:

> (a) Pursuing a similar vocation in competition with or becoming employed by a competitor of the person, association, company or corporation; or
>
> (b) Disclosing any trade secrets, business methods, lists of customers, secret formulas or processes or confidential information learned or obtained during the course of his or her employment with the person, association, company or corporation

if the agreement is supported by valuable consideration and is otherwise reasonable in its scope and duration.[viii]

Post-employment restrictive covenants "will be upheld only if it is reasonably necessary to protect the business and goodwill of the employer."[ix] Factors such as the territory limits, hardship imposed, and time the covenant lasts are all relevant facts in determining whether a restrictive covenant on employment are reasonable.[x]

[i] Nev. Rev. Stat. § 608.030.

[ii] *Id.* § 608.020.

[iii] *Id.* § 608.040(1)(a).

[iv] *Id.* § 608.040(1)(b).

[v] *Id.* § 608.040(2).

[vi] Nev. Rev. Stat. § 613.200(1).

[vii] *Id.*

[viii] *Id.* § 613.200(4).

[ix] Jones v. Deeter, 913 P.2d 1272, 1275 (Nev. 1996) (citing Hansen v. Edwards, 426 P.2d 792, 793 (Nev. 1967)).

[x] *Id.*

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NEW JERSEY

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1. Is the state generally an employment-at-will state?

New Jersey is an "employment-at-will" state. An employment relationship remains terminable at the will of either an employer or employee, unless an agreement exists that provides otherwise." *Witkowski v. Thomas J. Lipton, Inc.*, 136 *N.J.* 385, 397, 643 *A.*2d 546 (1994). There are exceptions, however, to the at-will doctrine. For example, an employer's grounds for termination cannot be contrary to public policy, *Pierce v. Ortho Pharmaceutical Corp.*, 84 *N.J.* 58, 71-72, 417 *A.*2d 505 (1980). Furthermore, an employer may not fire a worker on grounds that violate New Jersey or federal anti-discrimination statutes.

2. Are there any statutory exceptions to the employment-at-will doctrine?

New Jersey Law Against Discrimination: An employee may not be discharged for a discriminatory reason. N.J.S.A. § 10:5-1 to -28 (prohibiting discrimination on basis of race, creed, sex, age, marital status, ancestry, national origin, family status, genetic information, atypical cellular or blood trait, gender identity or expression, or affectional or sexual orientation)

New Jersey Conscientious Employee Protection Act: An employee may not be discharged for exposing the employer's illegal activity or activity that contravenes public policy intended to protect the health, safety, or welfare of the environment. N.J.S.A § 34:19-1 et seq.,

Retaliation Statutes (See below).

3. Are there any public policy exceptions to the employment-at-will doctrine?

In 1980, the New Jersey Supreme Court created an exception to "employment-at-will" doctrine by establishing "a cause of action for wrongful discharge when the discharge is contrary a clear mandate of public policy." *Pierce v. Ortho Pharm. Corp.*, 417 A.2d 505, 84 N.J. 58 (1980).

To determine what constitutes public policy, New Jersey courts will look to statutes, constitutional provisions, regulations, judicial decisions, and (perhaps) professional codes of ethics to determine if a given practice has been endorsed (e.g. the right to collect workers' compensation benefits) or prohibited (e.g. criminal laws prohibiting perjury).

4. Is there any law related to the hiring process?

New Jersey' Opportunity to Compete Act ("Ban the Box") limits the ability of covered New Jersey employers to inquire into a job applicant's criminal record. The Act also prohibits covered employers from using employment advertisements that expressly disqualify from consideration applicants with an arrest or conviction. The Act does not prohibit an employer from deciding not to hire an applicant based upon his or her criminal record, unless the record has been expunged or the conviction pardoned.

The Act does not provide aggrieved individuals with a private right of action against an employer who has violated, or is alleged to have violated, the law. Instead, the New Jersey Commissioner of Labor and Workforce Development can impose a civil penalty not to exceed $1,000 for the first violation, $5,000 for the second violation and $10,000 for each subsequent violation.

5. Does the state recognize implied employment contracts under employment handbooks, policies, or practices?

An employee manual "may give rise to an implied contract of employment if its provisions 'contain an express or implied

promise concerning the terms and conditions of employment.' " *Witkowski v. Thomas J. Lipton, Inc.*, 136 *N.J.* 385, 393, 643 A.2d 546 (1994) (quoting *Gilbert v. Durand Glass Mfg. Co., Inc.*, 258 *N.J.Super.* 320, 330, 609 A.2d 517 (App.Div.1992)).

6. Does the state have a right to work law or other labor / management laws?

New Jersey expressly provides the right to unionize to employees of public utilities and other public employees, N.J. Rev. Stat. §§ 34:13A-5.3, 34:13B-2. Various New Jersey employment laws, addressing issues like minimum wage, protect employees' right to collective bargaining. See, e.g., N.J. Rev. Stat. §§ 34:11-56a26, 34:11-56.41, 34:11-56.67. State court decisions have upheld both closed-shop and union-shop agreements. See *F. F. East Co. v. United Oysterman's Union,* 21 A.2d. 799 (N.J. 1941).

7. What tort claims are recognized in the employment context?

a. Intentional Infliction of Emotional Stress

Employees can recover for intentional infliction of emotional distress in the workplace based on the conduct of supervisors and co-employees. To recover for intentional infliction of emotional distress, plaintiff must demonstrate: (1) that the defendant acted intentionally or recklessly, both in doing the act and in producing emotional distress; (2) that the defendant's conduct was so outrageous in character and extreme in degree as to go beyond all bounds of decency; (3) that the defendant's actions were the proximate cause of the emotional distress; and (4) that the emotional distress suffered was so severe that no reasonable person could be expected to endure it. Wigginton v. Servidio, 734 A.2d 798, 806, 324 N.J. Super. 114 (App. Div. 1999).

b. Negligent Infliction of Emotional Distress

A plaintiff claiming negligent infliction of emotional distress must show that the defendant owed plaintiff a legal duty of care, that the duty was breached, that the plaintiff suffered genuine and substantial emotional distress, and that defendant's acts proximately caused that distress. See Decker v. The Princeton Packet, 561 A.2d 1122, 1128, 116 N.J. 418, 427 (1989). See also Young v. Hobart West Group, 897 A. 2d 1063, 1074-75, 385 N.J. Super. 448, 468-69 (App. Div. 2005). The injury must also be foreseeable. Byrd v. Fed. Express Corp., 2008 U.S. Dist. LEXIS 16891 *22 (D.N.J. Mar. 4, 2008). This requirement ensures "that the tortious conduct will cause genuine and substantial emotional distress or mental harm to average persons." Decker, 561 A.2d at 1128.

c. Harassment

Harassment is another form of workplace discrimination prohibited by the New Jersey Law Against Discrimination.

d. Invasion of Privacy

In determining whether an employee has a right to privacy in the workplace, New Jersey courts balance the employee's legitimate expectation of privacy against the interests of the private employer. See Vargo v. Nat'l Exch. Carriers Ass'n, 870 A.2d 679, 687, 376 N.J. Super. 364, 377 (App. Div. 2005). Although the right to privacy is not protected by statute, courts in New Jersey recognize the tort of "intrusion by seclusion." In general, a person who intentionally intrudes, physically or otherwise, upon an individual's private affairs or concerns may be liable for the intrusion, if the intrusion would be highly offensive to a "reasonable person." Hennessey v. Coastal eagle Point Oil Co., 129 N.J. 81, 94-95 (1992), quoting Restatement (Second) of Torts § 652B (1977).

8. Is there a common law or statutory prohibition against discrimination / hostile work environment?

The New Jersey Law Against Discrimination the Act (N.J.S.A. § 10:5-1 to -28) declares it to be an unlawful employment practice, or as the case may be, unlawful discrimination "For an employer, because of the race, creed, color, national origin, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, pregnancy, sex, gender identity or expression, disability or atypical hereditary cellular or blood trait of any individual, or because of the liability for service in the Armed Forces of the United States or the nationality of any individual, or because of the refusal to submit to a genetic test or make available the results of a genetic test to an employer, to refuse to hire or employ or to bar or to discharge or require to retire, unless justified by lawful considerations other than age, from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment…" N.J.S.A. 10:5-12(a).

All remedies available in common law tort actions are available to prevailing plaintiffs. N.J.S.A. 10:5-13. A successful claimant may receive various remedies, including ""economic loss; time loss; [and] physical and emotional stress." N.J.S.A. § 10:5-3. A successful plaintiff is entitled to an award of equitable remedies, such as reinstatement to his or her former position where

feasible. N.J. Stat. Ann. § 10:5-17. A prevailing plaintiff is also entitled to an award of reasonable attorneys' fees under the NJLAD. N.J.S. A. § 10:5-27. Punitive damages may also be recovered in certain circumstances.

9. Is there a common law or statutory prohibition or retaliation?

New Jersey Law Against Discrimination: prohibits employers from unlawfully taking reprisals against any individual that (1) opposed any practices or acts proscribed by the NJLAD; or (2) filed or intended to file a complaint, testify, or assist in any proceeding under the NJLAD. N.J. S.A. § 10:5-12(d).

New Jersey Family Leave Act: An employee may not be discharged (or discriminated against) in retaliation for opposing a practice that violates the New Jersey Family Leave Act. Nor may an employee be discharged (or discriminated against) in retaliation for filing a charge, instituting a proceeding, providing information in connection with a proceeding, or testifying in a proceeding under the Family Leave Act. The Family Leave Act allows employees to take time off from work to care for a new-born child or to attend to a serious health condition of a family member. N.J.S.A § 34:11B-9.

New Jersey Civil Service Act: An employee may not be retaliated against for disclosing a violation of law, governmental mismanagement, or abuse of authority. N.J.S.A. § 11A:2-24.

New Jersey Minimum Wage Act: An employee may not be discharged (or discriminated against) in retaliation for making a complaint, instituting a proceeding, or testifying in a proceeding concerning minimum wage violations. Also, an employee may not be discharged (or discriminated against) for serving on a wage board. An employer may fined up to $1,000 per violation. N.J.S.A § 34:11-56a24.

Occupational Health and Safety: An employee may not be discharged (or discriminated against) in retaliation for filing a complaint, instituting a proceeding, testifying in a proceeding, or exercising rights concerning worker health and safety. N.J.S.A § 34:6A-45.

Workers' Compensation: An employee may not be discharged (or discriminated against) in retaliation for claiming (or attempting to claim) workers' compensation benefits, or testifying in a workers' compensation proceeding. An employer may be fined up to $1,000 and imprisoned for up to 60 days for violations of this statute. N.J.S.A § 34:15-39.1.

New Jersey Security and Financial Empowerment Act: An employee may not be discharged or discriminated against on the basis that the employee took or requested any leave to address circumstances resulting from domestic violence or a sexually violent offense. N.J.S.A. § 34:11C-1 et seq.

10. Is the state a deferral state for charges filed with the EEOC?

Yes

11. Are there any state laws related to compensation, including wage and hour, paid time off, mandatory breaks, fringe benefits, allowable deductions, prevailing wage rates for public contracts, etc.?

New Jersey Wage and Hour Law, N.J.S.A. 34:11-56a, et seq., regulates employment practices such as the basic minimum wage and overtime pay standards. However, certain aspects are not regulated. The law does not require: vacation, holiday, severance or sick pay; meal or rest periods for workers over 18 years of age; pay raises or fringe benefits.

12. Is there a state statute governing paid or unpaid leaves?

The Family Leave Act allows employees to take time off from work to care for a new-born child or to attend to a serious health condition of a family member. N.J.S.A § 34:11B-1, et seq.

An aggrieved party may be awarded punitive damages in an amount not greater than $10,000.00 except that in the case of a class action or a director's complaint the total amount of punitive damages shall not exceed $500,000.00 or 1% of the net worth of the defendant, whichever is less. N.J.S.A § 34:11B-11.

In an action or complaint brought under this act, the prevailing party may be awarded reasonable attorneys' fees as part of the cost, provided however, that no attorneys' fees shall be awarded to the employer unless there is a determination that the action was brought in bad faith. N.J.S.A § 34:11B-12.

The New Jersey Security and Financial Empowerment Act provides that certain employees are eligible to receive unpaid leave of absence, for a period up to 20 days in a 12-month period, to address circumstances resulting from domestic violence or sexually violent offense. N.J.S.A. § 34:11C-4.

13. Is there a state law governing drug-testing?

a. Public Employers

A public employee in a safety-sensitive position may be tested for illegal drug use, either randomly or with probable cause,

[ixif the government's interest in safety outweighs the employee's right to privacy. *See Rawlings v. Police Dep't of Jersey City*, 627 A.2d 602, 133 N.J. 182 (1993); *see also N.J. Transit PBA 304 v. N.J. Transit Corp.*, 701 A.2d 1243, 151 N.J. 531 (1997) (upholding the random drug testing of transit police officers because the officers had a diminished expectation of privacy and the state had a compelling interest in public safety).

b. Private Employers

New Jersey law permits private employers to perform random drug testing on employees in safety-sensitive positions. *See Hennessey v. Coastal Eagle Point Oil Co.*, 609 A.2d 11, 129 N.J. 81 (1992) (permitting an employer to perform a random urine test on employees engaged in lead pumping at a refinery because the potential harm that could occur if an employee was under the influence of drugs outweighed the employee's privacy interests and thus did not violate a "clear mandate of public policy"). However, the Hennessey court expressly stated that private employees maintain privacy rights that can be violated by random drug testing if their right to privacy outweighs the societal right or need for safety. See Id.

14. Is there a medical marijuana statute?

N.J.S.A. § 24-61, et seq. Allowed for certain qualifying conditions

15. Is there trade secret / confidential information protection for employers?

Under the New Jersey Trade Secrets Act, which became effective January 9, 2012, the holder of a trade secret may recover damages for its misappropriation. See N.J.S.A. 56:15-1, et seq. An action for misappropriation must be commenced within three years after the misappropriation was discovered or by the exercise of reasonable diligence should have been discovered. Damages for violations of this statute may include both the actual loss caused by the misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. Damages may also be measured by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret. A court is authorized to award punitive damages in an amount not exceeding twice any damage award if willful and malicious misappropriation exists and, if certain conditions are satisfied, reasonable attorney's fees and costs to the prevailing party. Actual or threatened misappropriation may be enjoined and, in exceptional circumstances, an injunction may condition future use upon payment of a reasonable royalty for no longer than the time period for which use could have been prohibited.

16. Is there any law related to employee's privacy rights?

In most cases, New Jersey employers may read any correspondence made from employer-owned computer portals. Even the smallest of New Jersey employers institute their own NJ employee rights that make e-mail servers, copy machines and fax machines property of the company. New Jersey employees, therefore, have no reasonable expectation of privacy with respect to said machines.

17. Is there any law restricting arbitration in the employment context?

New Jersey public policy favors arbitration. *See Martindale v. Sandvik, Inc.*, 800 A.2d 872, 173 N.J. 76 (2002). Arbitration clauses in employee manuals, employment contracts, and employment applications are valid, despite the fact that there may be inequality in bargaining power between employer and employee. Id. In order to be enforceable, however, employees must sign, or otherwise clearly and affirmatively indicate agreement to, the arbitration clause. *See Leodori v. Cigna Corp.*, 814 A.2d 1098, 1107, 175 N.J. 293, 306 (2003).

18. Is there any law governing weapons in the employment context?

No.

NEW MEXICO

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1. Is the state generally an employment-at-will state?

New Mexico is an at-will employment state.

2. Are there any statutory exceptions to the employment-at-will doctrine?

No statutory exceptions, other than those provided under our Human Rights Act. See, § 28-1-1, NMSA 1978.

3. Are there any public policy exceptions to the employment-at-will doctrine?

There is a public policy exception. This exception was articulated in the case of *Vigil v. Arzola*, 102 N.M.682, 699 P.2d. 613 (Ct. App.1983). Under *Vigil* and it's progeny, if you can show that a termination occurred in violation of some clearly articulated public policy, and establish it by a preponderance of the evidence, you can pursue a tort remedy for wrongful termination. Jury trial is available under a *Vigil v. Arzola* theory. Damages recoverable include economic loss, emotional distress, and other tort type damages and punitive damages.

4. Is there any law related to the hiring process?

There are none.

5. Does the state recognize implied employment contracts under employment handbooks, policies, or practices?

Yes. The state does recognize implied employment contracts as a consequence of employee handbooks, policies and practices. See, *Kestenbaum v. Pennzoil Company,* 108 N.M. 20, 766 P.2d 280 (1988); *Newberry v. Allied Stores, Inc.*, 108 N.M. 424, 773 P.2d 1231 (1989); *West v. Washington Tru Solutions, LLC*, 147 N.M. 424, 224 P.2d 651 (2009) (the totality of the circumstances of the employment relationship must be examined to determine whether there was an implied contract modifying the at will relationship. That implied contract may be found in written or oral representations, and the parties' conduct or a combination of those factors).

6. Does the state have a right to work law or other labor / management laws?

No right to work law. The state has a Public Employee Collective Bargaining Act, see, § 10-7e-1 et seq., NMSA 1978. The state also has a prevailing wage statute requiring payment of prevailing wages as determined by the Director of the Labor Relations Division of the Workforce Solutions Department on most public works projects of any significance. See, § 13-4-10 to 13-4-13, NMSA 1978.

7. What tort claims are recognized in the employment context?

a. Intentional Infliction of Emotional Distress in a wrongful termination context and for violation of the Human Rights Act. See, *Trujillo v. Northern Rio Arriba Electric Cooperative, Inc.*, 131 N.M. 607, 41 P.3d 333 (2001); *Coates v. WalMart Stores, Inc.*, 127 N.M. 47, 976 P.2d 989 (1999).

b. Negligent Infliction of Emotional Distress may be recoverable. See, *Coates v. WalMart Stores, Inc.*, 127 N.M. 47, 976 P.2d 989 (1999).

c. Intentional/Reckless Acts based on an exception to the Workers Compensation Bar. The case that articulates the exception is known as *Delgado v. Phelps Dodge*, 131 N.M. 272, 34 P.3d 1148 (2001). In order to successfully assert a *Delgado* claim,

evidence must be submitted establishing that the worker or employer (1) engaged in an intentional act or omission, without just cause or excuse,(2) that the act was reasonably expected to result in the injuries suffered by the worker, (3) that the worker or employer expected the intentional act or omission to result in the injury or utterly disregarded the consequences and (4) that the intentional act or omission proximately caused the injury. In addition, the conduct evidenced by the employer must rise to the same level of callousness or egregiousness of the conduct the employer was alleged to have engaged in in the *Delgado* case. The standard is very high. See, *May v. DCP Midstream, LP*, 148 N.M. 595, 241 P.2d 193 (Ct. App.2010).

d. Prima Facia Tort: New Mexico has adopted the doctrine of prima facia tort. See, *Schmitz v. Smentowski*, 1990-NMCA-002, 109 N.M. 386. Prima facia tort is a catch all that allows the pleading of a tort cause of action against an alleged tortfeasor even if the underlying action was lawful if it was undertaken for the purpose of harming the alleged victim and without sufficient other justification. See, *Id*. A recent case, which is currently on certiorari to our New Mexico Supreme Court, allows the pursuit of a prima facia tort claim against another party to a contract for what were, in essence, damages for breach of the contract even in the face of a determination that the contract had been properly terminated. See*, Beaudry v Farmers Insurance Exchange*, 2017-NMCA-016, 388 P.3d 662.

e. Negligent Hiring and/or Retention: New Mexico has recognized a cause of action for negligent hiring and/or retention. See, *Lessard v. Coronado*, 142 NM 583, 168 P.3d 155 (Ct. App. 2007).

f. Whistleblower Protection Act: New Mexico has a Whistleblower Protection Act. It applies only to public employees. See NMSA 1978, § 10-16C-1, *et al*.

g. Retaliatory Discharge: See, *Vigil v. Arzola*, 102 N.M.682, 699 P.2d. 613 (Ct. App.1983); *Wiedler v. Big J Enterprises,* 124 N.M. 591, 953 P.2d 1089 (Ct. App. 2001).

h. New Mexico also has allowed claims for intentional interference with contract for interfering with the contractual arrangements between an employer and employee; *Ettenson v Burke*, 130 N.M.67; 17 P.3d 440 (Ct. App. 2000); *Zarr v Washington Tru Solutions, LLC*, 146 N.M.274; 208 P.3d 919 (Ct. App. 2009).

8. Is there a common law or statutory prohibition against discrimination / hostile work environment?

Yes. The New Mexico Human Rights Act which is codified at § 28-1-1, et seq., NMSA 1978, prohibits discrimination on the basis of race, age, religion, color, national origin, ancestry, sex, physical or mental handicap, serious medical condition, spousal affiliation, sexual orientation, or gender identity.

Retaliation is also prohibited. Certain of the protected categories are tied to number of employees. There is an administrative process that has to be exhausted prior to initiating any litigation.

Damages recoverable include lost earnings, emotional distress and attorneys' fees and costs.

9. Is there a common law or statutory prohibition of retaliation?

Yes

a. Discrimination Claims: § 28-1-7I(2) NMSA 1978

b. Workers' Compensation Claims: See, § 52-1-28.2 NMSA 1978.

c. Whistle Blowing: There is a Whistleblower Protection Act at § 10-16c-1 et seq. NMSA 1978. The Act only implies to public employees.

d. Occupational Health and Safety Issues: § 50-9-25, NMSA 1978 prohibits discrimination or retaliation as a consequence of filing of an Occupational Safety and Health Complaint or testifying in an Occupational Safety and Health proceeding.

The public policy exception to the at-will employment doctrine: Some of the case law dealing with the public policy exception has held that the following might constitute grounds for application of the exception:

i. A program by an insurance company requiring adjusters to settle a certain amount of unrepresented bodily injury claims for less than $150 within 60 days is a violation of the public policy reflected by the Insurance Claims Practice Act. *Sherrill v Farmers Insurance Exchange*, 2016-NMCA-056; 374 P.3d 723 (Ct. App. 2016)

ii. Discharge of an employee in alleged retaliation for exercising his rights under the Workers' Compensation Act violates public policy. See, *Michaels v. Anglo American Auto Auctions, Inc.,* 117 N.M. 91, 869 P.2d 279 (1994); claims of retaliation for reporting Occupational Safety and Health Act violations are cognizable under the public policy exception. See, *Gutierrez v. Sundancer Indian Jewelry, Inc.*, 117 N.M. 41, 868 P.2d 1266 (Ct. App.1993).

iii. Violation of the Human Rights Act can support a claim for retaliatory discharge. See, *Gandy v. Walmart Stores, Inc.*,

117 N.M. 441, 872 P2d 859 (1994).

e. Voting: § 1-12-42(A) NMSA 1978. Two hours must be given to vote. Although no case law on the subject, presumably retaliation for exercising rights under the statute would support a claim for retaliation.

f. Jury Duty/Court Attendance: § 38-5-18 NMSA 1978 prohibits an employer from retaliating as a consequence of jury duty.

10. Is the state a deferral state for charges filed with the EEOC?

Yes

11. Are there any state laws related to compensation, including wage and hour, paid time off, mandatory breaks, fringe benefits, allowable deductions, prevailing wage rates for public contracts, etc.?

Minimum wage and maximum hours: § 50-4-22, NMSA 1978 provides for minimum wage of $7.50 per hour, 40-hour work week. Certain home rule municipalities in the state have a minimum wage greater than the state wide minimum. There are exemptions for overtime provided in § 50-4-24, NMSA 1978 which are not anywhere near as extensive as under the Federal Act.

Only deductions allowed are those specifically authorized in writing. See, § 50-4-2(B), NMSA 1978.

Overtime: Non-exempt employees must be paid 1 ½ times their regular wage in all hours worked in excess of 40 hours in one week. See, § 50-4-22(D), NMSA 1978.

Prevailing wage rates: See above.

12. Is there a state statute governing paid or unpaid leaves?

i. Voting: See above

ii. Jury duty: See above

iii. Military leave: See below

13. Is there a state law governing drug-testing?

The New Mexico Motor Carrier Safety Act: § 65-3-1, et seq., NMSA 1978.

14. Is there a medical marijuana statute?

Yes. § 26-2b-1 et seq., NMSA 1978 allows for the possession of and use of medical cannabis. Requires the user to get registry identification cards to purchase cannabis from a licensed producer. Medical cannabis purchase is compensable under the Workers' Compensation Act. See, *Vialapando v. Ben's Automotive Services*, 2014-NMCA-084, 331 P.3d 975 (Ct. App.2014). Employer may refuse to extend job offer to employee who fails drug test, notwithstanding that cannabis use is for medical purposes, no accommodation required. See, *Garcia v. Tractor Supply Company,* 154 F.Supp. 3d 1225 (D.N.M. 2016).

15. Is there trade secret / confidential information protection for employers?

Yes. § 57-3a-1, et seq., NMSA 1978.

16. Is there any law related to employee's privacy rights?

§ 50-4-34, NMSA 1978 prohibits employers from requiring a prospective employee to provide a password to gain access to an employee's account or profile on a social networking site.

17. Is there any law restricting arbitration in the employment context?

No.

18. Is there any law governing weapons in the employment context?

New Mexico allows concealed carry with appropriate license or permit. The regulations specifically provide at § 10.8.2.16 F NMAC that a licensee may not carry on private property that has signs posted prohibiting the carrying of concealed weapons or when verbally told by a person in possession of the property not to carry.

19. Miscellaneous employment or labor laws not discussed above?

Tape Recording of Conversations: New Mexico law permits a party to a conversation to record a conversation without the other party's knowledge. See, § 30-12-1, NMSA 1978.

New Mexico Domestic Violence Act Leave: Employers must grant employees up to fourteen (14) days of leave to obtain or attempt to obtain an order of protection or relief from domestic violence or abuse. See, § 50-4-A-2, NMSA 1978.

Child Labor: A child under the age of sixteen (16) may not work but forty (40) hours per week or start before 7:00 a.m. or work past 9:00 p.m. See, § 50-6-3(A), (B)2, NMSA 1978.

New Mexico adopted in 2017 a state version of USERRA, see § 28-15-1, NMSA 1978.

NEW YORK

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1. Is the state generally an employment-at-will state?

Yes. The at-will doctrine articulated over one hundred years ago by the Court of Appeals in *Martin v. New York Life Ins. Co.* remains largely unchanged in New York State. *Martin v. N.Y. Life Ins. Co.*, 148 N.Y. 117, 42 N.E. 416 (1895).

2. Are there any statutory exceptions to the employment-at-will doctrine?

Whistleblower protection. N.Y. Lab. Law § 740.

3. Are there any public policy exceptions to the employment-at-will doctrine?

a. The "handbook exception." The case of *Weiner v. McGraw-Hill, Inc.*, the Court of Appeals held that although a hiring of indefinite duration is terminable at-will, an employer could still be liable for arbitrarily discharging an employee, if the employee can establish that the employer had a written policy limiting its right of discharge, which the employee was both aware of and relied detrimentally on in accepting the employment. *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 443 N.E.2d 441 (1982).

b. The "professional exception." The case of *Wieder v. Skala* provides a narrow exception for attorneys practicing at law firms. *Wieder v. Skala*, 80 N.Y.2d 628, 609 N.E.2d 105 (1992). The Court's later decision in *Sullivan v. Harnisch* declined to add a further exception, and strongly affirmed the at-will doctrine. Thus, it appears that the bench remains committed to that position. *Sullivan v. Harnisch*, 19 N.Y.3d 259, 261, 969 N.E.2d 758, 759 (2012).

4. Is there any law related to the hiring process?

Employers in New York are subject to a variety of laws regulating the hiring process.

Advertising

For instance, New York City employers must abide by New York City's Fair Chance Act ("FCA") which makes it an unlawful discriminatory practice for employers to express any limitation or specification based on a person's arrest or criminal conviction in their job solicitations, advertisements, and related publications. See N.Y.C Admin. Code § 8-11-a(1).

Following on the heels of the Great Recession, New York City enacted legislation which prohibits discrimination against candidates for employment based on their status as unemployed. It specifically prohibits "advertisements for any job vacancy" that limits or specifies that the applicant's must be employed when applying for the job. See N.Y.C. Admin. Code § 8-107(21)(a)(2).

Applications

Given the prevalence of identity theft, New York has enacted laws restricting the use and publication of social security numbers in an effort to safeguard such data. This issue is regulated by a number of different statutes. The New York Social Security Number Protection Law prohibits employers from publishing social security numbers and requires employers to take steps to ensure the confidentiality of such numbers. See N.Y. Gen. Bus. Law § 399-d. The New York Labor Law prohibits employers from publicly posting or displaying an employee's social security number, visibly printing a social security number on any identification badge or card, including time card, and placing social security numbers in files with unrestricted access. See N.Y. Lab. Law § 203.

Background checks

Generally, state and federal fair credit reporting acts limit use of credit reports to investigate job applicants. Under New

York's Fair Credit Reporting Act, employers are required to notify prospective employees that a background check report will be sought and upon request advise whether it has been sought. See N.Y. Gen. Bus. Law § 380-c(b).

a. Arrests, Convictions, and Criminal Records

New York specifically prohibits inquiries into "any arrest or criminal accusation" of a job candidate. It is an unlawful discriminatory practice, unless specifically permitted by another statute, "to make any inquiry about, whether in any form of application or otherwise, or to act upon adversely . . . any arrest or criminal accusation of such individual not then pending . . . in connection with the . . . employment . . . of such individual." N.Y. Exec. Law § 296 (16).

While job applicants cannot be asked about prior arrests or charges, candidates may be asked whether they have been convicted of a crime. However, New York law explicitly restricts and regulates employers with respect to obtaining and using information related to a job candidate's criminal history. The New York Correction Law sets out a broad general rule that employers, with 10 or more employees, cannot deny employment to an applicant solely based on his or her status as an ex-offender. See *Schwartz v. Consolidated Edison, Inc.* 13 N.Y.S.3d 884 (2015), *aff'd* 147 A.D.3d 447, 47 N.Y.S.3d 9 (1st Dep't 2017). Under New York's Correction Law, it is unlawful for an employer to deny employment because of a conviction unless there is a "direct relationship" between the offense and the job or unless the hiring poses an "unreasonable risk." N.Y. Corr. Law § 752. New York Labor Law Section 201-f requires employers to conspicuously post in the workplace a copy of this Article 23-A of the New York Correction Law and any applicable regulations.

Under the FCA, a/k/a New York City's "ban the box" law, all New York City employers, with at least four employees, are prohibited from making any inquiry into a job applicant's criminal history until **after** a conditional offer of employment has been extended to the candidate. See N.Y.C Admin. Code § 8-11-a(b). (The "box" refers to that space on job applications for candidates to check if they have ever been convicted of a crime). The law then prescribes specific steps an employer must take should it want to rescind the contingent offer on the basis of the applicant's criminal history. These notifications are in addition to those required under the federal Fair Credit Reporting Act.

Despite these overriding protections, there are number of occupations, particularly those focusing on finance, education and healthcare, and transportation, where New York mandates background or criminal conviction checks. These requirements are set forth in number of different New York statutes, and include, but are not limited to the following: Securities industries employees (N.Y. Gen. Bus. Law § 359-e); educators (N.Y. Educ. Law §§ 3001-d, 652-a); childcare workers (N.Y. Soc. Serv. Law § 390-b, N.Y. Exec Law § 837-m, N.Y. Pub. Health Law §§ 1392-a, 1394-a, and 1394-b); and individuals working with the elderly (N.Y. Pub. Health Law § 2899-a).

b. Credit checks

Generally, employers in New York must comply with the state's fair credit reporting act. See Gen. Bus. Law § 350-b. While state requirements, are for the most part are the same as the federal requirements, employers must comply with both.

In contrast, by virtue of the Stop Credit Discrimination in Employment Act a/k/a "Credit Check Law", it is an unlawful discriminatory practice for an employer in New York City to obtain or use the consumer credit history of an applicant for employment or current employee for most jobs in connection with decisions regarding "hiring, compensation, or the terms, conditions or privileges of employment." N.Y.C. Admin. Code § 8-107. There are limited exceptions for certain positions or roles e.g., law enforcement. See id. at § 8-107(f).

c. Medical history

New York State Human Rights Law and New York City Human Rights Law make it unlawful to discriminate against candidates and employees because of actual or perceived disabilities. The New York State Human Rights Law prohibits genetic testing as a condition of employment with the narrow exception where it relates to an employee's susceptibility to a disease concerning the job at issue. See N.Y. Exec. Law § 296(19).

d. Drug screening

New York does not have a state law regulating drug testing by private employers except transportation providers. See N.Y. Comp. Codes. R. Regs. tit. 17 § 720. Drug testing is not prohibited or restricted unless it violates other legal provisions such as laws prohibiting discrimination such as an actual or perceived disability.

5. Does the state recognize implied employment contracts under employment handbooks, policies, or practices?

New York does recognize the implied contract exception to the employment-at-will doctrine, but it is a very narrow one. To be successful in a breach of contract action, a plaintiff must establish that an employer had an express written policy limiting its right to discharge and that the employee relied on that policy. *Weiner v. McGraw-Hill, Inc.*, 57 NY2d 458. Such policies are often found in employee handbooks. *However,* it appears that all an employer need do to avoid the application of this exception is also to have in its policy, or handbook, a clear statement that the employment relationship is one of employment-at-will, with either party having the ability to terminate the relationship at any time, without notice and without cause.

6. Does the state have a right to work law or other labor / management laws?

New York is *not* a "right-to-work" state. However, New York does have a comprehensive set of laws entitled New York Labor Law, found in the Consolidated Laws of New York. There are forty-seven (47) separate articles in the Labor Law; examples: Article 5 (Hours Of Labor), Article 9 (Prevailing Wage For Building Service Employees), Article 18 (Unemployment Insurance Law), Article 19 (Minimum Wage Act), Article 20 (New York State Labor Relations Act), Article 22-A (Injunctions In Labor Disputes). The State Labor Relations Act is essentially a "mini-NLRA" applicable to private sector employers not meeting the federal jurisdictional standards.

In 2010, New York enacted the New York State Construction Industry Fair Play Act, found in Article 25-B, which provides penalties for an employer in that industry who misclassifies employees as independent contractors.

In 2014, New York enacted the New York State Commercial Goods Transportation Industry Fair Play Act, found in Article 25-C, similar to the above act, dealing with this industry.

7. What are the tort claims recognized in the employment context?

New York like other states recognizes a variety of tort causes of action in the employment context. The following is a list of the generally more common tort claims often alleged by employees:

Defamation

Defamation is the making of a false statement about a person that "tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him or her in the minds of right-thinking person, and deprive them of their friendly intercourse in society." *Frechtman v. Gutterman*, 115 A.D. 3d 102, 104 (2014) *citing Rinaldi v. Holt, Reinhart & Winston*, 42 NY2d 369, 279 (1977), *cert denied* 434 US 969 (1977). The elements include "a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se." Id. at 104 *citing Dillon v. City of New York*, 261 A.D.2d 34, 38 (1st Dep't 1999).

Intentional Infliction of Emotional Distress

Very few cases meet the standard necessary to recover under this tort theory. Liability here is predicated on the "extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another." *Murphy v. American Home Products Corp.*, 58 N.Y.2d 293, 303 (1983). In fact, "liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Id. *citing Restatement of Torts, Second* § 46, subdivision 1, comment d.

Invasion of Privacy

While many states recognize the stand alone tort of invasion of privacy, New York State does not recognize that common law tort except to the extent it comes within the Civil Rights Law §§ 50 and 51. See *Farrow v. Allstate Insurance Company*, 53 A.D.3d 563, 564 *citations omitted* (2008). Those statutes protect against the appropriation of a plaintiff's name or likeness for defendant's benefit without his or her consent. Id.

Negligent Misrepresentation

Nor does New York recognize the common law tort of negligent misrepresentation. Under New York law, a plaintiff may recover for negligent misrepresentation only where the defendant owes a fiduciary duty. See *Stewart v. Jackson Nash*, 976 F.2d 86, 90 (2d Cir. 1992). (In *Stewart*, the plaintiff, an attorney employed at-will alleged that her former employer misrepresented the extent of the firm's environmental practice during the recruiting process). The court found that the plaintiff asserted no facts establishing a fiduciary duty either before or after she became employed at the law firm. See

id. at 90. Without more, a mere employee-employer relationship does not create the fiduciary duty required to recover on a negligent misrepresentation theory. See id.

Tort claims initiated by employers against employees often involve the following:

Breach of duty of loyalty

Employees owe a fiduciary duty of undivided loyalty to their employers. An employee owes a "duty of good faith and loyalty to an employer in the performance of the employee's duties." *Island Sports Physical Therapy v. Kane*, 84 A.D.3d 879 citations omitted (2011).

Tortious Interference

A claim for tortious interference with contract requires the plaintiff to establish the existence of a valid contract, the defendant's knowledge of the contract, that the defendant intentionally procured the breach of that contract, and a damages. See *Pyramid Brokerage Company, Inc. v. Citibank (N.Y. State)*, N.A., 145 A.D.2d 912 – 13 (1988). Moreover, the defendant must be shown to have engaged in "wrongful conduct" interfering with a prospective contractual relationship between the plaintiff and a third party. See *Smith v. Meridian Tech., Inc.*, 86 A.D.3d 557, 560 (2011). Wrongful conduct must amount to "a crime or an independent tort" and may consist of "fraud or misrepresentation" with "economic pressure" as "persuasion alone" will not be sufficient. Id. at. 560 add'l citations omitted.

Faithless Servant

In addition, under appropriate facts, employers may be able to assert a tort claim under the faithless servant doctrine which could entitle the successful plaintiff to forfeiture of paid compensation. The faithless servant doctrine applies where an individual "owes a duty of fidelity to a principal and . . . is faithless in the performance of . . . services." *In re Lehr Constr. Corp.*, 528 B.R. 598, 607 (S.D.N.Y. 2015). An employee found to be faithless normally forfeits all compensation received during the period of disloyalty, regardless of whether the employer suffered any damages. See *Levy v. Young Adult Institute, Inc.*, 103 F. Supp. 3d 426, 440 (S.D.N.Y. 2015). Notably, obtaining relief pursuant to the faithless servant doctrine does not require proving scienter. Specifically, the Second Circuit has stated that "[w]e find nothing in New York law to suggest that a specific intent to defraud is necessary to render misconduct sufficient to warrant forfeiture." *Phansalkar v. Andersen Weinroth & Co.*, 344 F.3d 184, 204 (2d Cir. 2003).

8. Is there a common law or statutory prohibition against discrimination / hostile work environment?

New York has two principal anti-discrimination laws, Article 15 of the New York Executive Law, which is known as the New York State Human Rights Law, and the New York City Human Rights Law. Both protect more categories than federal law and apply to all employers with four or more employees. While the New York State Human Rights Law and the New York City Human Rights Law are applicable to employers with four employees or more, all employers regardless of size are subject to their respective sexual harassment provisions. See N.Y. Exec. Law § 292(5); N.Y.C. Admin § 8-102(5).

The New York State Human Rights Law

The New York State Human Rights Law is a wide ranging statute that prohibits employment discrimination by employers and employment agencies, among others, based on the following protected categories: age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, and domestic violence victim status. N.Y. Exec. Law § 296(1)(a). Pregnancy discrimination is prohibited as well. N.Y. Exec. Law § 296(1)(g). While the New York State Human Rights law prohibits discrimination based on sexual orientation, it does not specifically include transgender as protected category. However, New York has recognized that a transgendered person has a sex discrimination claim under the New York State Human Rights Law. See *Buffong v. Castle on Hudson*, 12 Misc. 3d 1193(A), 824 N.Y.S.2d 752 (Sup. 2005). Moreover, the New York State Division of Human Rights issued regulations prohibiting discrimination on the basis of gender identity, transgender status, or gender dysphoria. See N.Y. Comp. Codes R. Regs. tit. 9 § 466.13. Finally, it is unlawful to discriminate against an individual under the New York State Human Rights Law based on arrest record; and under certain conditions set forth in the statute, past criminal convictions. Exec Law 296(16); see also Correction Law 752-54 and NY Labor Law 201-d.

The regulations implementing the New York State Human Rights Law provide important guidance regarding the implementation of these anti-discrimination statutes and can be found at found at Title 9 of the New York Official Compilation of Codes, Rules and Regulations Part 465. The regulations specifically provide that these statutes are to be liberally construed to accomplish the purposes of the law and to effectuate the policies of the New York State Division of Human Rights. See N.Y. Comp. Codes. R. Regs. tit. 9 § 465.20. The New York City Human Rights Law is accorded similar,

if not greater, liberal construction.

The New York City Human Rights Law

New York City Human Rights Law has several provisions with broader coverage than the New York State law. New York City Human Rights Law prohibits discrimination because of the *actual or perceived* age, race, creed, color, national origin, gender,gender, disability, marital status, partnership status, caregiver status, sexual orientation, *transgender, gender identify,* alienage or citizenship status of any person. See N.Y. Admin. Code § 8-107(1)(a).

The New York City Restoration Act of 2005, an amendment to the New York City Human Rights Law, includes a statement that state and federal law are the minimum standards to be applied when analyzing cases under the City's Human Rights Law. The Restoration Act has been interpreted as mandating an independent liberal construction of the New York City Human Rights Law provisions in all circumstances even where there are parallel provisions under state or federal law. See *Williams v. New York City Housing Authority*, 61 A.D.3d 62, 66 – 67 (1st Dep't 2009).

Hostile environment

The New York State Human Rights Law and New York City Human Rights Law both prohibit harassment based on protected characteristics. The New York State Human Rights Law requires that conduct be "severe and pervasive" to create an actionable hostile work environment, co-extensive with federal anti-discrimination law. See *EEOC v. Rotary Corp.*, 297 F. Supp. 2d 643, 665 (N.D.N.Y 2003). However, consistent with the independent liberal construction to be accorded the New York City Human Rights Law, a person need only has been treated "less well" due to a protected characteristic; if such is shown, an employer may avoid liability only by showing as an affirmative defense that the conduct was no more than "petty slights or trivial inconveniences." *Williams*, 61 A.D.3d at 78.

Remedies

Under the New York State Human Rights Law, remedies include back pay, reinstatement, and unlimited compensatory damages, and equitable relief such as injunctions. However, attorney's fees, and punitive damages in employment discrimination cases, are not available under New York State Human Rights Law. See *Thoreson v. Penthouse Int'l Ltd.*, 80 N.Y.2d 490, 498 (1992). However, the New York State Human Rights Law permit awarding civil fines and penalties in employment discrimination cases. See N.Y. Exec. Law § 297.4(c).

Under the New York City Human Rights Law available remedies include injunctions, reinstatement, hiring, or upgrading as well as legal remedies such as back pay and front pay; compensatory damages; *attorney fees*; *punitive damages*; and civil penalties of not more than $125,000 except that the penalty can be increased to $250,000 if the actions were willful, wanton, or malicious, subject to potential mitigation. See N.Y.C. Admin. Code §§ 8-120, 8-126, 8-502.

New York State Human Rights Law claims are generally tried to a jury. *See Song v. Ives Laboratories, Inc.,* 957 F.2d 1041, 1047-48. (2d Cir. 1992). The New York City Human Rights Law does not address whether a party is entitled to a jury trial, however violations of the law have been tried before a jury.

9. Is there a common law or statutory prohibition of retaliation?

Both the New York State Human Rights Law and the New York City Human Rights Law have anti-retaliation provisions. All prohibit discrimination against employees for complaining about discriminatory acts or filing a complaint. In addition, New York has a number of statutes prohibiting retaliation against employees who engage certain types of protected activity.

Under the New York State Human Rights Law, employers, licensing agencies, and employment agencies are prohibited under from discharging or otherwise taking action against an individual because the employee "opposed any practice forbidden under the Human Rights Law or because he/she has filed a complaint, testified or assisted in any proceeding under this article. N.Y. Exec. Law § 296(1)(e).

New York Labor Law is another source of protection against retaliation. Section 215 makes it an unlawful for an employer to discharge, penalize, discriminate, or otherwise retaliate against an employee because he or she has complained to the employer or Department of Labor about a possible labor law violation, provided information to the Department of Labor, testified about acts under the Labor Law, or exercised any rights that are protected under the Labor Law. Section 740 provides a limited exception to the employee at-will doctrine for a narrow category of whistleblowers. This New York whistleblower law prohibits retaliation against private employee whistleblowers who have reported unlawful activity that represents a "substantial and specific danger to the public health or safety." N.Y. Lab. Law § 740(2)(a). However, this statute is strictly construed and as such, the risk must be to the public at large. See *Green v. Saratoga A.R.C.*, 233 A.D.2d 821 (3d Dep't 1996). Moreover, the statute's protections extend only to those who report actual violations, rather than employees reporting based on their reasonable belief that unlawful activity has occurred. See *Bordell v. Gen. Elec. Co.*, 208 A.D.2d 219 (3d Dep't 1995).

Furthermore, there is a specific whistleblower protection provision for healthcare workers. The Health Care Whistleblower Protection Law prohibits healthcare employers from retaliating against employees who disclose issues of improper patient care. See N.Y. Lab. Law § 740(6).

Employers should be wary of potential discrimination claims arising out of employee life-style choices outside of the workplace. The "Lifestyle Discrimination" statute, Section 201-d of the New York Labor Law, protects private employees from retaliatory adverse employment actions based on non-work related activities. The statute makes it unlawful discrimination for an employer to terminate an employee for, among other things, recreational activities, political activities, and legal use of consumable products outside of the workplace and work hours without the employer's equipment. See N.Y. Lab. Law § 201-d.

Employers are further prohibited from retaliating against employees for pursuing other statutory entitlements such as filing a claim for workers compensation with the Department of Labor. See N.Y. Workers' Compensation Law § 120. New York State also provides protection against employees for engaging in civic activities such as jury duty. See N.Y. Jud. Law § 519. An employer who discharges or penalizes an employee for serving as a juror may be prosecuted by the Office of the Attorney General and subjected to criminal penalties. See id.

The New York City Human Rights Law makes it an unlawful discriminatory practice to retaliate or discriminate in any manner against any person who has opposed a practice prohibited by this chapter, filed a complaint, commenced a civil action, assisted in the government's investigation of allegations of violations of this chapter. See N.Y. C. Admin. Code § 8-107(7). Notably, the retaliation or discrimination complained of "need not result in the ultimate action with respect to employment . . . or in a materially adverse change in the terms and conditions of employment, . . . the retaliatory or discriminatory act or acts complained of must be reasonably likely to deter a person from engaging in protected activity. See id.

The New York City Human Rights Law provides that it is unlawful to interfere with any of the protected rights or to coerce, intimidate, threaten, or interfere with anyone because of aiding or encouraging another person to exercise the rights granted under the law. See N.Y.C. Admin. Code § 8-107(19).

10. Is the state a deferral state for charges filed with the EEOC?

Yes, the state has a comprehensive equal employment opportunity law administered by the New York State Division on Human Rights.

11. Are there any state laws related to compensation, including wage and hour, paid time off, mandatory breaks, fringe benefits, allowable deductions, prevailing wage rates for public contracts, etc.?

New York regulates wages and hours extensively through Article 6 of the New York Labor Law and the accompanying regulations, published at Title 12 of the New York Official Compilation of Codes, Rules and Regulations, Subchapter B, Parts 141-146. Areas covered by the statute include minimum wages, overtime, tip pooling and tip credits, gratuities for banquet workers, day of rest, meal and lactation breaks, supplemental benefits, uniform allowances, commissioned employees, and deductions from pay. Notice and recordkeeping requirements are extensive and should be reviewed annually for compliance.

The New York State Department of Labor Wage and Hour Division enforces the Labor Law. Their website is extensive and generally helpful. https://labor.ny.gov/workerprotection/laborstandards/workprot/lshmpg.shtm

A private right of action is available for violations of the Labor Law, and successful plaintiffs can recover liquidated damages and attorneys' fees. In an action brought by the Commissioner of Labor, additional civil penalties may be assessed. Class actions are available and relatively common, particularly in the hospitality industry. The statute of limitations is six years.

New York has several different minimum wages, depending on the location of the employer and the size and type of business. The New York State minimum wage increased on December 31, 2016. In New York City, it is $10.50 per hour for businesses with 10 or fewer employees, and $11.00 per hour for businesses with 11 or more employees. In Nassau, Suffolk and Westchester counties, it is $10.00 per hour. In the remainder of the state, it is $9.70 per hour. There are different hourly rates for worker in the fast food industry and those who receive tips. These rates remain in effect until December 30, 2017.

Separate Wage Orders govern the Hospitality Industry (including fast food workers), Building Service Industry, Farm Workers, and Miscellaneous Industries and Workers. The Miscellaneous Industries rates are included in the chart below.

General Minimum Wage Rate Schedule

Location	12/31/16	12/31/17	12/31/18	12/31/19	12/31/20	2021*
NYC - Large Employers (of 11 or more)	$11.00	$13.00	$15.00			
NYC - Small Employers (10 or less)	$10.50	$12.00	$13.50	$15.00		
Long Island & Westchester	$10.00	$11.00	$12.00	$13.00	$14.00	$15.00
Remainder of New York State	$9.70	$10.40	$11.10	$11.80	$12.50	*

* Annual increases for the rest of the state will continue until the rate reaches $15 minimum wage (and $10 tipped wage). Starting 2021, the annual increases will be published by the Commissioner of Labor on or before October 1. They will bebased on percentage increases determined by the Director of the Division of Budget, based on economic indices, including the Consumer Price Index.

12. Is there a state statute governing paid or unpaid leaves?

Time off for Voting – N.Y. Election Law Section 3-110 provides for limited time off for voting under certain circumstances. A posting is required in advance of election day. Rarely litigated.

Jury duty – N.Y. Judiciary Law Section 519 makes it unlawful to discharge an employee for attending jury duty. Wages may be withheld, but employers with 10 or more employees must pay the first forty dollars' daily wages for the first three days of jury service. There is no private right of action under Section 519; it is enforced via criminal contempt proceedings.

Paid Family Leave

As of January 1, 2018, New York will implement a comprehensive paid family leave benefit covering most private sector employees. This employee-funded, job protected, paid leave benefit will be mandatory for private sector employees (unless they opt-out—see below), while public-sector employers will be able to opt their employees in if they choose. Collectively-bargained employees can only be excluded if they have access to a benefit that is at least as favorable as the state-mandated Paid Family Leave (PFL) program.

All aspects of the PFL will be administered by the Workers Compensation Board, which issued proposed regulations on February 22, 2017. The leave benefit will be paid for with employee payroll deductions that will fund premiums for an insurance policy purchased by the employer through their disability carrier. Employers may also choose to self-insure.

There is a comprehensive website that includes links to the statute and proposed regulations at https://www.ny.gov/programs/new-york-state-paid-family-leave

PFL is NOT a paid sick leave program. Under PFL, leave time can be used only for a family illness or other specified situations, including:

Providing care for close family members with serious health conditions

Bonding with a newborn during the first 12 months following birth or adoption (even if the child was born or placed for adoption before January 1, 2018)

Meeting birth, adoption, or foster care obligations

Attending to a qualifying exigency (as defined under the federal Family Medical Leave Act) arising from the service of a family member in the Armed Forces of the United States.

Family members" are defined as spouse, domestic partner, child, parent, parent-in-law, grandparent, or grandchild.

Full-time employees who work 26 weeks for a covered employer are eligible to file a claim for leave. Part-timers (defined in the proposed regulations as those who work less than 5 days per week) are eligible after working 175 days for a covered employer within a 52-week period. Claims will be filed with the insurance carrier and must be supported with medical or other relevant proof. The amount of leave available will be based on a retroactive, "rolling backward" 52-week period. Unlike the FMLA, leave must be taken in full-day or full-week increments. Total allowable leave time for part-timers is prorated.

Disputes relating to eligibility and amount of leave will be processed through arbitration procedures at the Workers Compensation Board. Claims for retaliation, discrimination, or failure to re-instate made by employees who take leave will be litigated administratively at the Workers Compensation Board in the same manner as similar disputes under the Workers Compensation Law.

The details of the PFL program will be somewhat uncertain until final regulations are issued during the summer of 2017.

13. Is there a state law governing drug-testing?

No.

14. Is there a medical marijuana statute?

Yes. The Compassionate Care Act - N.Y. Pub. Health Law § 3360, et. seq.

15. Is there trade secret / confidential information protection for employers?

New York has not adopted a version of the Uniform Trade Secrets Act (UTSA), and, in fact, does not have a statute governing trade secrets law. Instead, it is based solely on the common law. Like the UTSA, however, New York law creates civil liability for "misappropriation" of someone else's trade secret(s). New York's criminal larceny statute may also impose criminal liability for stealing trade secrets. The first major difference between the Act and the common law lies in the definition of a "trade secret." New York case law defines a trade secret as any "formula, pattern, device or compilation of information which is used in one's business, and which gives [the employer] an opportunity to obtain an advantage over competitors who do not know or use it." *Ashland Mgt. v. Janien*, 82 N.Y.2d 395, 407 (1993). New York courts typically use a complicated, six-factor balancing test to determine if a "trade secret" exists, examining (1) the extent to which the information is known outside the business; (2) the extent to which those involved with the business know the information; (3) the extent to which measures are taken to protect the information's secrecy; (4) how valuable the information is; (5) the expense and/or difficulty involved in developing the information; and (6) the difficulty with which others could develop the information. See, e.g., *Marietta Corp. v. Fairhurst*, 301 A.D.2d 734, 738 (3d Dep't 2003).

Another significant difference between New York common law and the UTSA is that in New York, a singular, discrete event will not qualify as a "trade secret"; rather, a trade secret "is a process or device for continuous use in the operation of the business." *Softel, Inc. v. Dragon Med. & Scientific Commc'ns, Inc.*, 118 F.3d 955, 968 (2d Cir. 1997). The UTSA, in contrast, contains no such continuous use requirement, and the commentary makes clear that it is a departure from the common law, broadening the definition of trade secret and the protections for the holders of such secrets. UTSA § 1.

16. Is there any law related to employee's privacy rights?

Yes.

i. Video - No employer may cause a video recording to be made of an employee in a restroom, locker room, or room designated by an employer for employees to change their clothes, unless authorized by court order. No video recording made in violation of this section may be used by an employer for any purpose. N.Y. Lab. Law § 203-c.

ii. Confidential/identity information – New York Law guards against potential misuse of Social Security numbers and has ramifications for employers who collect Social Security information. The law requires businesses that possess Social Security numbers to implement appropriate safeguards and limit unnecessary employee access to Social Security numbers. N.Y. Lab. Law § 203-d.

The Breach Notification Law requires businesses to promptly notify the owner of data about any security breach. N.Y. Gen. Bus. Law § 899-aa.

iii. Fingerprinting - N.Y. Lab. Law § 201-a.

iv. Polygraph tests - No employer or his agent shall require, request, suggest or knowingly permit any employee or prospective employee of such employer to submit to a psychological stress evaluator examination and no employer shall administer or utilize the results of such test within or without the state of New York for any reason whatsoever. Violation of this section constitutes a misdemeanor. N.Y. Lab. Law § 735.

17. Is there any law restricting arbitration in the employment context?

New York courts routinely enforce mandatory arbitration agreements.

18. Is there any law governing weapons in the employment context?

There are no New York statutes addressing weapons in the work place.

NORTH CAROLINA

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1. Is the state generally an employment-at-will state?

North Carolina is an employment-at-will state. Either an employer or employee has the option to terminate employment for any reason. Exceptions apply to this rule: the employment action may not violate a (1) specific statute; (2) public policy; or (3) a contractual agreement. An employment agreement may affect whether or not an employer may terminate employment. If an employer and employee create and sign an agreement that specifies a definite term of employment, cause is required for the employer to discharge the employee before the end of the term specified in the agreement.

2. Are there any statutory exceptions to the employment-at-will doctrine?

There are statutory exceptions to the employment-at-will doctrine. They include:

N.C. Gen. Stat. § 95-240-249 (Retaliatory Employment Discrimination Act);

N.C. Gen. Stat. § 168A-5(a) (1) (Persons with Disabilities Protection Act);

N.C. Gen. Stat. § 9-32(a) (employee called for jury duty or serving as grand juror);

N.C. Gen. Stat. § 95-28.1, 28.1(A) (a), 28.2(b), 28.3(b) (possession of sickle cell; requesting genetic testing; smoker's rights law; parental involvement in school)

3. Are there any public policy exceptions to the employment-at-will doctrine?

There is a common law claim for wrongful termination in violation of public policy. One of the implications of House Bill 2 when originally enacted was the elimination of the state law wrongful discharge in violation of public policy cause of action that had allowed employees to sue former employers for discriminatory firings for up to three years after their termination dates. In July of 2016 the North Carolina General Assembly restored the wrongful discharge claim eliminated by House Bill 2 by restoring a terminated employee's right to sue on the basis of race, religion, color, national origin, age, sex, or disability. The restored cause of action only has a one-year statute of limitations. Additionally, employers may not discharge an employee in retaliation for filing certain claims against the employer. N.C. Gen. Stat. § 143-422.2.

4. Is there any law related to the hiring process?

North Carolina has legislation governing the posting of jobs by a "job listing service". A job listing service is defined as a business operated for profit which publishes vacant positions with any employer other than itself and which charges fees to applicants for its services and which does not perform any activities of a private personnel service other than publishing job listings. N.C. Gen. Stat. § 95-47.19. A job listing service is prohibited from (a) publishing false information; (b) posting vacancies for a business where workers are on strike or lockout, unless the applicant is informed of this fact in the publication; (c) posting vacancies for an employer engaged in "unlawful or immoral" activity; (d) posting vacancies about an employer in which the listing service has a 10% or greater financial interest; or (e) posting vacancies about an employer that the listing service knows or has reason to know is in financial or other difficulty likely to lead to imminent cessation of the employer's business. N.C. Gen. Stat. § 95-47.28.

An employer who discloses information about a current or former employee's job history or job performance to a prospective employer of the current or former employee upon request is not liable in civil damages for the consequences of that disclosure; however, this immunity does not apply if there is evidence that the disclosed information was false and that the employer providing the information knew or should have known that the information was false. Job Reference Law, N.C. Gen. Stat. §

1-539.12. North Carolina also has a blacklisting law prohibiting employers from preventing or attempting to prevent a discharged employee from obtaining employment. Blacklisting Law, N.C. Gen. Stat. § 14-355.

No state legislation restricting background checks or inquiries into credit histories for hiring purposes. Employers must comply with the Federal Fair Credit Reporting Act. No state legislation restricting the use of social media in background checks or inquiries for employment purposes exists.

Employers are prohibited from requiring applicants to disclose information concerning arrests, criminal charges, or criminal convictions that have been expunged. N.C. Gen. Stat. § 15A-153. The prohibition does not apply to state or local law enforcement agencies authorized by statute to access confidential files for employment purposes. Penalties may be assessed for any violation that occurs after receipt of a written warning. Some professions in North Carolina require a criminal background check. These include: hospitals, nursing homes, mental health facilities, home care agencies, day care facilities, child placement agencies, substance abuse facilities, and for profit or non-profit institutions that provide care to children, the sick, disabled, or elderly.

It is unlawful for any employer with 25 or more employees to require any applicant to pay the cost of a medical examination or the cost of furnishing records required by the employer as a condition of hiring. N.C. Gen. Stat. § 14-357.1. This prohibition does not apply if the records are required by law. The North Carolina Department of Labor takes the position that such records include criminal records. Any employer that violates this section may be fined.

5. Does the state recognize implied employment contracts under employment handbooks, policies, or practices?

Employment contracts need not be in writing in order to be legally enforceable; however, restrictive covenants such as covenants not to compete must be in writing and signed by the employee in order to be enforceable. Employment contracts contain implied terms of good faith and fair dealing in order to effect the intention of the parties. A court may read implied terms into an employment agreement depending on the nature and substance of the contract.

North Carolina recognizes implied employment contracts in the context of workers' compensation policy. Under the Workers' Compensation Act, an employee is defined as a person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens and minors, whether lawfully or unlawfully employed, but excluding persons whose employment is both casual and not in the course of the trade, business, profession, or occupation of his employer, and as relating to those so employed by the State. N.C. Gen. Stat. § 97.2.

6. Does the state have a right to work law or other labor / management laws?

North Carolina is a right to work state. An employer may not deny or abridge the right of persons to work on account of membership or non-membership in any labor union or labor organization or association. N.C. Gen. Stat. § 95-78.

7. What tort claims are recognized in the employment context?

North Carolina employees and employers may assert the following common law tort claims under North Carolina law relating to claims of wrongful discharge, discrimination, or harassment in the employment context:

- Intentional Infliction of Emotional Distress
- Negligent Infliction of Emotional Distress
- Assault and/or battery
- Invasion of privacy
- Negligent retention
- Negligent supervision
- Tortious interference with contractual relationship
- Tortious interference with prospective contractual opportunity
- Fraud

8. Is there a common law or statutory prohibition against discrimination / hostile work environment?

The Equal Employment Practices Act (NCEEPA) prohibits employment discrimination on the basis of race, religion, color, national origin, age, sex, or handicap by employers who employ fifteen or more employees. N.C. Gen. Stat. § 143-422.2.

The NCEEPA does not specifically define which employment practices are prohibited, but simply provides that it is the state's public policy to "protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement" because of protected class membership. North Carolina courts recognize a cause of action for wrongful discharge in violation of public policy claim where the public policy articulated by NCEEPA is used by a plaintiff as the basis for the wrongful discharge claim. The Act itself, however, contains no enforcement provision allowing for a private cause of action. There is no statutory damages cap. Available damages are not specifically addressed by the text of the NCEEPA, but a plaintiff alleging wrongful discharge in violation of the public policy articulated in NCEEPA may typically recover compensatory damages, lost wages, and punitive damages. There is no statutory provision addressing the issue of whether a right to a jury trial exists. However, a plaintiff asserting a wrongful discharge in violation of the public policy articulated in NCEEPA has access to a jury trial. The Human Relations Commission administers and enforces the NCEEPA and has authority to (a) receive charges of discrimination from the EEOC and (b) investigate and mediate charges of discrimination. The 180 day statute of limitations for filing charges of discrimination with the EEOC governs employees' rights under the NCEEPA. Wrongful discharge claims must be brought within three (3) years. N.C. Gen. Stat. § 1-52(5).

No state law addresses discrimination based on sexual orientation or gender identity, although some cities and counties have included sexual orientation and gender identity in local laws prohibiting discrimination. On March 23, 2016, the North Carolina General Assembly passed House Bill 2, which explicitly provided that local governmental units may not pass laws or ordinances that conflict with North Carolina laws regulating discriminatory practices in employment and may not include additional protected classes, such as gender identity or sexual orientation. On March 30, 2017, the North Carolina General Assembly passed House Bill 142. House Bill 142 repealed House Bill 2 and included two additional provisions. First, it preempts regulation of access to multiple occupancy restrooms, showers or changing facilities except in accordance with North Carolina law. Second, it prohibits local governments from enacting or amending any ordinance regulating private employment practices or regulating public accommodations through December 1, 2020.

The North Carolina Persons with Disabilities Protection Act (PDPA) provides for a private cause of action against employers of 15 or more employees. N.C. Gen. Stat. § 168A-11. The NCDPA protects against disability discrimination in the employment context, as well as in public accommodations, public service, and public transportation settings. A plaintiff must commence a civil action related to employment discrimination under the PDPA within 180 days after he "became aware of or, with reasonable diligence, should have become aware of the alleged discriminatory practice or prohibited conduct." N.C. Gen. Stat. § 168A-12. Under the PDPA, there is no explicit statutory cap limiting damages. The PDPA limits back pay awards by not allowing back pay to accrue from a date more than two years prior to the filing of the action. N.C. Gen. Stat. § 168A-11(b). PDPA damages are limited to back pay and reasonable attorney's fees. N.C. Gen. Stat. § 168A-11(b) and (d). Under the PDPA, there is no right to a jury trial. N.C. Gen. Stat. § 168A-11(a). Plaintiffs cannot bring both a federal Americans with Disabilities Act claim and a PDPA claim simultaneously. Temporary impairments are not considered to be disabilities under the PDPA. The PDPA does not cover individuals with active alcoholism or drug addiction or abuse.

The North Carolina Communicable Disease Act provides that it is "unlawful to discriminate against any person having AIDS virus or HIV infection on account of that infection in determining suitability for continued employment. N.C. Gen. Stat. § 130A-148(i). In determining suitability for continued employment, employers must not require, perform, or use any AIDS test or discriminate against any person based on their AIDS or HIV status. Employers may do the following: (a) require a test for AIDS for job applicants in pre-employment medical exams; (b) include an AIDS test as part of an annual medical examination routinely required of all employees; or (c) take action, including reassignment or termination of employment, if the continuation of an infected employee's work tasks would pose a significant risk to the health of the employee, coworkers, or the public, or if the employee is unable to perform the normally assigned duties of the job. However, employers should consider the requirements of the Americans with Disabilities Act before taking any adverse action against an individual in accordance with this statute. Civil actions must be brought within 180 days after the date the aggrieved person became aware of, or should have become aware of, the alleged discriminatory practice or conduct.

No employer may deny or refuse employment to an individual or discharge an employee on the basis that such person possesses sickle cell trait or hemoglobin C trait. N.C. Gen. Stat. § 95-28.1. The statute of limitations for wrongful discharge claims under this statute is 3 years.

No employer may deny or refuse employment or fire someone from employment based on the fact that the person requested genetic testing or counseling services. An employer also may not deny or refuse employment or fire someone from employment based on any genetic information obtained concerning the individual or a member of the individual's family. N.C. Gen. Stat. § 95-28.1A. The statute of limitations for wrongful discharge claims under this statute is 3 years.

No employer of three or more employees may discriminate against an employee or prospective employee who engage or have engaged in the lawful use of lawful products so long as that activity (a) occurs off the employer's premises during non-working hours; and (b) does not adversely affect the employee's or prospective employee's job performance or ability to fulfill the

responsibilities of the position or the safety of other employees. This statute is N.C. Gen. Stat. § 95-28.2 and is commonly referred to as the “Smoker’s Rights Law”. Claims must be brought within one year from the date of the alleged violation.

The Hazardous Chemicals Right to Know Act protects employees who have (a) assisted the Commissioner of Labor or the Fire Chief with an inspection regarding hazardous chemicals; (b) testified, or are about to testify, in a proceeding regarding hazardous chemicals; or (c) requested information from the employer regarding chemicals used or stored at the employer’s facility. N.C. Gen. Stat. §§ 95-173 to 95-221. The statute of limitations for wrongful discharge claims under this statute is 3 years.

An employer may not discharge, threaten to discharge, or otherwise intimidate or oppress an employee based on any vote in an election that he or a family member casts, considers casting, or fails to case. An employer may not seek to control any vote that a subordinate may cast by threat or intimidation. The violation of this law constitutes a Class 2 misdemeanor. N.C. Gen. Stat. § 163-271.

An employer may not discharge or demote an employee based on the fact that the employee is called for jury duty or is serving as a grand juror or petit juror. N.C. Gen. Stat. § 9-32. An employer which violates this statute is liable in a civil action for reasonable damages suffered by an employee and the employee may be reinstated to his former position. The statute of limitations on this action is one year.

There is no North Carolina law governing workplace sexual harassment in the private sector. North Carolina prohibits local board of education members and employees from retaliating against employees who report sexual harassment. N.C. Gen. Stat. § 115C-335.5.

An employer may not discriminate against an employee because his wages are subject to withholdings for child support or for payment of services at a public hospital. N.C. Gen. Stat. §§ 110-136.8(e), 131E-50.

9. Is there a common law or statutory prohibition of retaliation?

Pursuant to the Retaliatory Employment Discrimination Act (REDA), N.C. Gen. Stat. § 95-240 et seq., no employer may take any retaliatory action against an employee acting in good faith who files or threatens to file a claim or complaint; initiate an inquiry, investigation, inspection, proceeding, or action; testifies; or provides information to any person with respect to any of the following:

- The Workers’ Compensation Act (N.C. Gen. Stat. §§ 97-1 through 97-101.1);
- The Wage and Hour Act (N.C. Gen. Stat. §§ 95-25.1 through 95-25.25);
- The Occupational Safety and Health Act of North Carolina (N.C. Gen. Stat §§ 95-126 through 95-160);
- The Mine Safety and Health Act (N.C. Gen. Stat. §§ 74-24.1 through 74-24.20);
- Prohibitions against discrimination based on sickle cell or hemoglobin C trait (N.C. Gen. Stat. § 95-28.1);
- National Guard reemployment rights (N.C. Gen. Stat. §§ 127A-201 through 127A-203);
- Prohibitions against discrimination based on genetic testing or counseling (N.C. Gen. Stat. § 95-28.1A);
- The North Carolina Pesticide Law (N.C. Gen. Stat. §§ 143-434 through 143-470.1);
- The Drug Paraphernalia Control Act of 2009 (N.C. Gen. Stat. §§ 90-113.80 through 90-113.84);
- Provisions regarding parents of delinquent or undisciplined juveniles (N.C. Gen. Stat. §§ 7B-2700 through 7B-2706); or
- Provisions regarding domestic violence (N.C. Gen. Stat. §§ 50B-1 through 50B-9).

The North Carolina False Claims Act protects whistleblowers from retaliation by their employers for filing a claim or assisting the State with a claim against the employer. Any person who commits the following acts may be held liable for three times the amount of damages that the State receives from the Act: (1) knowingly presents a false or fraudulent claim for payment or approval; (2) knowingly makes or uses a false record or statement that is material to a fraudulent claim; (3) conspires to commit any of these crimes; (4) has control over property or money used by the State; (5) is authorized to make or deliver a document certifying receipt of property used or to be used by the State and, intending to defraud the State, makes or delivers the receipt without completely knowing that the information on the receipt is true; (6) knowingly buys or receives public property from any officer of the State who has no legal authority to do so; (7) knowingly makes, uses, or causes to be made or used, a false statement that is material to an obligation to pay money or property to the State, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the State. N.C. Gen. Stat. § 1-607.

10. Is the state a deferral state for charges filed with the EEOC?

North Carolina is a deferral state for charges filed with the EEOC. The Office of Administrative Hearings is designated to serve as the state's deferral agency for charges filed by state or local government employees deferred by the Equal Employment Opportunity Commission (EEOC) to the Office of Administrative Hearings, the Age Discrimination in Employment Act, and the Americans with Disabilities Act. The Office of Administrative Hearings has all necessary authority to function as a deferral agency. The Chief Administrative Law Judge is authorized to contract with the EEOC for the Office of Administrative Hearings to serve as a deferral agency and to establish and maintain a Civil Rights Division in the Office of Administrative Hearings to carry out the functions of a deferral agency.

When investigating a charge, a representative of the Civil Rights Division has access to State premises, records, and documents relevant to the charge and has the right to examine, photograph, and copy evidence. Any challenge to the Civil Rights Division to investigate the deferred charge shall not constitute grounds for denial or refusal to produce or allow access to the investigative evidence. N.C. Gen. Stat. § 7A-759.

11. Are there any state laws related to compensation, including wage and hour, paid time off, mandatory breaks, fringe benefits, allowable deductions, prevailing wage rates for public contracts, etc.?

The North Carolina Wage and Hour Act (NCWHA) is located at N.C. Gen. Stat. § 95-25 *et seq.* Employers must retain all records, posted notices, and writings required by the NCWHA and the rules and regulations contained therein for a period of three years. Employers that violate the provisions of the NCWHA risk exposure to double damages, attorney's fees, and civil penalties. Employees claiming a violation of the NCWHA may also file an administrative charge, which the North Carolina Department of Labor will investigate

a. Wage Payment

An employer must pay every employee all wages and tips accruing to the employee on a regular payday. Pay periods may be daily, weekly, bi-weekly, semi-monthly, or monthly. Wages based on bonuses, commission or other forms of calculation may be paid as infrequently as annually if prescribed in advance. N.C. Gen. Stat. § 95-25.6. Employees must be provided written notice of promised wages and the date and place for payment of wages at the time of hire, 24 hours' advance written notice of reductions in pay during employment, and written policies on forfeiture of vacation, bonus, and commissions. Commissions and bonus programs are construed against the employer when ambiguous. Final pay must be made on the next regular payday following termination of employment. Wages based on bonuses, commissions, or other forms of calculation may be paid on the first regular payday after the amount can be calculated.

b. Withholding of Wages

An employer may withhold any portion of an employee's wages if the amount or rate of the proposed deduction is known and agreed upon in advance. The employer needs written authorization from the employee that includes a signature, an explanation for the deduction, and a statement of the actual dollar amount or percentage of wages that is being deducted. Before any deductions are made, the employee must receive advance written notice of the amount that is being deducted, receive written notice of his or her right to withdraw the authorization, and be given a reasonable opportunity to withdraw the authorization in writing. N.C. Gen. Stat. § 95-25.8.

If the withholding of wages takes place, it must comply with certain requirements. In non-overtime workweeks, an employer may reduce wages to the minimum wage level. In overtime workweeks, employers may reduce wages to the minimum wage level for non-overtime hours. No reductions may be made to overtime wages owed. N.C. Gen. Stat. § 95-25.8.

An employer may withhold a portion of an employee's wages for cash shortages, inventory shortages, or loss or damage to an employer's property after giving the employee written notice of the amount to be deducted seven days prior to the payday on which the deduction is to be made. N.C. Gen. Stat. § 95-25.8.

An overpayment of wages to an employee resulting from a miscalculation or other error, advances of wages to an employee or to a third party at the employee's request, and the principal amount of loans made by an employer to an employee are considered prepayment of wages and may be withheld or deducted from an employee's wages. Deductions related to loans by an employer require written authorization. N.C. Gen. Stat. § 95-25.8.

If an employee has been charged with a crime or has been indicted or arrested as the result of the cash shortage, inventory loss, or loss or damage to the employer's property, his employer may withhold a portion of the employee's wages without written authorization. However, if the employee is ultimately found not guilty, the amount deducted must be

reimbursed to the employee. N.C. Gen. Stat. § 95-25.8.

c. Minimum Wage

Every employer shall pay to each employee who in any workweek performs any work, wages of at least $7.25 per hour or the minimum wage set forth in the Fair Labor Standards Act. N.C. Gen. Stat. § 95-25.3.

d. Overtime

An employer must pay one and one half the regular rate of pay for each hour worked over 40 hours in the workweek. However, employees of seasonal amusement or recreational establishments receive overtime compensation only after working more than 45 hours in the workweek. N.C. Gen. Stat. § 95-25.4. A private sector employer may not provide comp time to nonexempt employees instead of paying overtime compensation. Public employers may apply comp time in lieu of such compensation.

e. Exemptions

The North Carolina Wage and Hour Act provisions related to minimum wage, youth employment, and recordkeeping do not apply to: (1) any person employed in an enterprise engaged in commerce or the production of goods for commerce as defined in the Fair Labor Standards Act; (2) any person employed in agriculture, as defined under the Fair Labor Standards Act; (3) any person employed as a domestic, including babysitters and companions, as defined under the Fair Labor Standards Act; (4) any person employed as a page in the North Carolina General Assembly or in the Governor's Office; (5) bona fide volunteers in medical, educational, religious, or nonprofit organizations where an employer-employee relationship does not exist; (6) persons confined in and working for any penal, correctional or mental institution of the State or local government; (7) any person employed as a model, or as an actor or performer in motion pictures or theatrical, radio or television productions, as defined under the Fair Labor Standards Act; or (8) any person employed by an outdoor drama in a production role, including lighting, costumes, properties and special effects.

These provisions further do not apply to: (1) any employee of a boys' or girls' summer camp or of a seasonal religious or nonprofit educational conference center; (2) any person employed in the catching, processing or first sale of seafood, as defined under the Fair Labor Standards Act; (3) the spouse, child, or parent of the employer or any person qualifying as a dependent of the employer under the income tax laws of North Carolina; (4) any person employed in a bona fide executive, administrative, professional, or outside sales capacity; (5) any person participating in a ridesharing arrangement; or (6) any person who is employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, as defined in the Fair Labor Standards Act.

Additionally, these provisions do not apply to: (1) hours worked as a bona fide volunteer firefighter in an incorporated, nonprofit volunteer or community fire department or (2) hours worked as a bona fide volunteer rescue and emergency medical services personnel in an incorporated, nonprofit volunteer or community fire department, or an incorporated, nonprofit rescue squad.

Finally, these provisions do not apply to: (1) drivers, drivers' helpers, loaders, and mechanics, as defined under the Fair Labor Standards Act; (2) taxicab drivers; (3) seamen, employees of railroads, and employees of air carriers, ad defined under the Fair Labor Standards Act; (4) salespersons, mechanics and partsmen employed by automotive, truck, and farm implement dealers, as defined under the Fair Labor Standards Act; (5) salespersons employed by trailer, boat, and aircraft dealers, as defined under the Fair Labor Standards Act; (6) live-in child care workers or other live-in employees in homes for dependent children; or (7) radio and television announcers, news editors, and chief engineers, ad defined under the Fair Labor Standards Act.

Specific rules regarding minimum wage apply to tipped employees. The cash wage for tipped employees may go as low as $2.13 per hour as long as each employee receives enough in tips to make up the difference. Certain record-keeping and other rules apply in order to take a tip credit.

f. Child Labor

No minor under the age of fourteen shall be employed. Minors between the ages of fourteen and fifteen may not work more than 3 hours a day and 18 hours a week when school is in session. Minors between the ages of fourteen and fifteen may not work more than 8 hours a day and 40 hours a week when school is not in session. Minors between the ages of fourteen and fifteen may not work during school hours and work hours must be between 7 a.m. and 7 p.m., or until 9 p.m. when school is not in session. No youth under the age of 16 may work for more than five consecutive hours without an interval of at least 30 minutes for rest. A rest/break from a continuous period of work must be at least 30 minutes. No person who holds an Alcohol Beverage Control (ABC) permit for the on-premises sale or consumption of alcoholic beverages may employ a youth under 16 on the premises for any purpose unless the minor obtains written permission of

his parent or guardian and he is employed to work on the outside of the grounds of the premises for a purpose that does not involve the preparation, serving, dispensing, or sale of alcoholic beverages. No minor under 18 years of age may work without a youth employment certificate unless specifically exempted. Children under the age of 18 may work between 11 a.m. and 5 p.m. on days on which school is in session the following day. If the employee is 16 or 17 and the employer receives a written approval from a parent or legal guardian and from a school principal, the last restriction does not apply. N.C. Gen. Stat. § 95-25.5. Penalties for violation of the youth employment statutes shall not exceed $500 for the first violation and up to $1,000 for each subsequent violation. N.C. Gen. Stat. § 95-25.23.

12. Is there a state statute governing paid or unpaid leave?

North Carolina has no statutory requirement that an employer grant family or medical leave.

An employer is not required to provide vacation leave for employees. If, however, an employer does grant vacation leave, it must give all vacation time off or payment in lieu of time off in accordance with the policy or practice in place. An employer must notify employees of any changes in policy that result in forfeiture or loss of vacation time or pay. N.C. Gen. Stat. § 95-25.12. Employees not so notified are not subject to such loss or forfeiture.

North Carolina does not have any statutory requirements regarding maternity leave and has not extended benefits beyond those that are offered under the Family Medical Leave Act. However, the North Carolina Equal Employment Practices Act requires employers to provide female employees with the same benefits as those provided to all other employees. Therefore, employers can choose to provide leave for employees with temporary disabilities, including pregnancy disability, or not provide it at all, as long as all employees are treated the same. N.C. Gen. Stat. § 143-422.2.

The General Assembly of North Carolina feels strongly that parental involvement is an essential component of school success and positive student outcomes. Therefore, employers must grant four hours per year of unpaid leave to any employee who is a parent or guardian of a school-aged child so that the employee may attend or otherwise be involved at that child's school. The leave must be at a mutually agreed-upon time and the employer may require the employee to provide a written request for the leave at least 48 hours before the time desired for the leave. The employer may require that the employee show written verification from the child's school that the employee attended or was otherwise involved at the school during the time of the leave. Employers may not discharge or take adverse employment action against an employee who requests or takes this leave. N.C. Gen. Stat. § 95-28.3.

An employer may not fire an employee based on his performance of emergency military duty when he is an officer, warrant officer, or enlisted person in the military forces of North Carolina or the United States. N.C. Gen. Stat. § 127B-14. An employer may not take adverse action against any employee based on his performance of emergency military duty. Employers are not required to pay wages to any employee who is on leave for active service. N.C. Gen. Stat. § 127B-12. Any person who violates this statute is guilty of a Class 2 misdemeanor and each individual violation will constitute a separate and distinct offense. N.C. Gen. Stat. § 127B-15.

All employees have a right to take leave without pay if they are a member of the North Carolina National Guard and are called into service. An employer cannot force an employee to use or exhaust his vacation or other leave if he is called into service as a member of the National Guard. N.C. Gen. Stat. § 127A-201. Further, an employer cannot, based on this protected activity, deny initial employment, deny reemployment, deny retention in employment, deny promotion, or deny any employment benefits. If an employer violates this statute, it may be required to compensate the employee for any loss of wages or benefits suffered due to the employer's unlawful behavior. N.C. Gen. Stat. § 127A-203. The Commissioner of Labor enforces this statute, and the statute of limitations for wrongful discharge claims under this statute is 3 years.

N.C. Gen. Stat. § 50B-5.5 prohibits employers from discharging, demoting, denying a promotion, or disciplining an employee who has taken reasonable time off from work to obtain or attempt to obtain assistance as a victim of domestic violence.

No break times are required for employees 16 years of age and older. If an employer provides breaks, they must be at least 30 minutes in duration in order to deduct the time from the employee's wages. The employer is not required to provide a break room, but it may prohibit the employee from leaving the premises provided that the employee is completely relieved of duties during the break time. An employer is not required to provide smoke breaks or to provide a place for the employee to smoke. An employer is permitted to set its own rules during working hours concerning breaks and whether employees are permitted to smoke on premises during the workday.

Employers are not required to provide time off for adverse weather.

Employers are not required to recognize legal holidays.

Employers are not required to pay an employee for time spent on jury duty unless the employer has promised such wages (as is the case with all wage benefits contained in written policies) or unless the employee is classified as a salaried-exempt employee.

13. Is there a state law governing drug-testing?

An employer may require an applicant or employee to submit to a drug test as a condition of hiring or continued employment pursuant to, and in compliance with, the Controlled Substance Examination Regulation Act codified at N.C. Gen. Stat. § 95-230 *et seq.* and the regulations related thereto codified in 13 NCAC .0400. If an employer tests employees for controlled substances, it must use reliable and minimally invasive examinations and screenings. Employers are prohibited from imposing the costs of drug screening tests as a condition of hiring. N.C. Gen. Stat. § 14-357.1.

The Act does not protect employees from adverse actions taken by employers as a result of test results. Parental consent for drug testing of minors is not required. Consent of a minor is required in order to provide test results to parents. Alcohol is not listed as a drug that may be tested. N.C. Gen. Stat. § 90-87(5).

14. Is there a medical marijuana statute?

No.

15. Is there trade secret / confidential information protection for employers?

Under the North Carolina General Statutes, a "trade secret" is defined as business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that: (a) derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. N.C. Gen. Stat. § 66-152.

"Misappropriation" is defined as an acquisition, disclosure, or use of a trade secret of another without express or implied consent. A trade secret may be discovered through independent development, reverse engineering, or from being obtained from a person who holds a right to disclose the trade secret. N.C. Gen. Stat. § 66-152.

The court will consider the following factors in determining whether information constitutes a trade secret: (1) the extent to which the information is known outside the business; (2) the extent to which it is known to employees and others involved in the business; (3) the extent of measures taken to guard secrecy of the information; (4) the value of information to the business and its competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could properly be acquired or duplicated by others. *Byrd's Lawn & Landscaping, Inc. v. Smith,* 142 N.C. App. 371, 542 S.E.2d 689 (2001).

16. Is there any law related to employee's privacy rights?

North Carolina's Identity Theft Protection Act seeks to protect an individual's financial information and resources. N.C. Gen. Stat. § 75.60. The Act places certain obligations and restrictions on an employer's use of "personal information." "Personal information is defined broadly under the Act and includes a person's name in combination with identifying information such as social security numbers, driver's license numbers, bank account and credit card numbers, email addresses, PIN codes, or any other information that could be utilized to access an individual's financial resources. In addition to limiting the use and disclosure of personal information, the Act imposes a duty on employers to report any security breaches where personal information may have been compromised. The Act also requires employers to dispose of personal information in a reasonable manner and implement formal written policies and procedures for disposal.

N.C. Gen. Stat. § 110-139 requires employers to disclose social security numbers of their employees to the Department of Health and Human Services for purposes of enforcing or entering child support orders.

The North Carolina Electronic Surveillance Act governs an employer's access to employee communications. The Act makes it a crime for any person to intercept, endeavor to intercept, or procure another person to intercept or endeavor to intercept any wire, oral, or electronic communication. North Carolina follows the one-party consent rule, which permits the recording of conversations so long as one party involved in the conversation knows that it is being recorded or when the nature and circumstances of the communication do not give rise to an expectation of privacy. N.C. Gen. Stat. § 15A-287(a).

North Carolina statutes governing the confidentiality of personnel records relate only to public employees. N.C. Gen. Stat. § 126-22 provides that except as provided in N.C. Gen. Stat. §§ 126-23 and 126-24, personnel files of State employees shall not be subject to inspection and examination as authorized by N.C. Gen. Stat. § 132-6. Pursuant to N.C. Gen. Stat. § 131E-257.2, certain privacy protections are provided for personnel files of employees and applicants maintained by a public hospital, notwithstanding the provisions contained in N.C. Gen. Stat. § 132-6 relating to examination and inspection of public records.

17. Is there any law restricting arbitration in the employment context?

The North Carolina Court of Appeals has affirmed the state's policy toward arbitration, holding that the public policy of our state favors arbitration when and where the parties have entered into an enforceable agreement to arbitrate. *King v. Bryant,* 737 S.E.2d 802 (2013). No specific cases have been decided which serve to restrict the use of arbitration in an employment context, but the North Carolina Department of Labor has established an arbitration service which includes a list of qualified arbitrators available to resolve labor disputes. N.C. Gen. Stat. § 95-36.1. The costs of such arbitration are paid in accordance with an agreement between the parties. In the absence of an accord, the award in the proceeding shall normally include arbitration costs. The Commissioner of Labor may provide for the arbitration costs when such action serves the public interest. The Department of Labor has also established a conciliation service. Upon the Commissioner's own motion or in an existent or imminent labor dispute, the Commissioner may, and upon the direction of the Governor, must order a conciliator to take such steps as seem expedient to effect a voluntary, amicable and expeditious adjustment and settlement of the differences and issues between the parties. Any information revealed within the context of a conciliation is confidential and is not subject to subpoena in any civil lawsuit.

18. Is there any law governing weapons in the employment context?

Private employers are given the authority to regulate or restrict an employee's ability to carry a gun onto the employer's premises, even when the employee has a valid concealed-carry permit when and where the private employer conspicuously posts a notice or statement indicating that concealed carry is prohibited. N.C. Gen. Stat. § 14-415.11(c)(8). The North Carolina concealed carry statute provides that it is illegal for a person to intentionally carry concealed weapons except when the person is on his own premises, which includes the workplace. These weapons include a bowie knife, dirk, dagger, loaded cane, metallic knuckles, razor, stun gun, or any other deadly weapon. N.C. Gen. Stat. § 14-269.

N.C. Gen. Stat. § 95-260, the Workplace Violence Prevention Act, enables employers to obtain civil no-contact orders on behalf of an employee who has suffered "unlawful conduct" from any individual that can reasonably be construed to be carried out, or to have been carried out, at the employee's workplace. A civil no-contact order can provide a wide array of injunctive relief, including enjoining the offending individual from contacting or visiting the employee on the employer's premises or interfering with the employer's operations. A violation of a civil no-contact order can result in a fine and imprisonment. Employees who are targets of unlawful conduct who are unwilling to participate in this process may not face disciplinary action based on their level of participation or cooperation.

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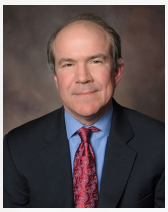
OHIO

By: Steve Forbes



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1. Is the state generally an employment-at-will state?

Yes. Ohio is an employment-at-will state. The Ohio Supreme Court has consistently held that, unless otherwise agreed, either party to an employment-at-will agreement may terminate the employment relationship for any reason which is not contrary to law. This doctrine has been repeatedly followed in Ohio, which has long recognized the right of employers to discharge employees at will. See, *e.g., Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100 (1985); *LaFrance* v. *Internatl. Brotherhood*, 108 Ohio St. 61 (1923).

2. Are there any statutory exceptions to the employment-at-will doctrine?

Yes. Ohio statutes prohibit discrimination based on race, color, religion, sex, military status, national origin, disability, age and ancestry. *See, generally,* R.C. 4112.01, *et seq*. The statutes are discussed in more detail in response to Question 8. Ohio also has a "whistle blower" statute. This statute limits, under certain specific circumstances, an employer's ability to take adverse action against an employee who makes a report of a violation of any state or federal statute or any ordinance or regulation of a political subdivision, that the reporting employee's employer has the ability to correct. R.C. 4113.52

3. Are there any public policy exceptions to the employment-at-will doctrine?

Yes. Ohio recognizes a claim for termination in violation of public policy. *Wiles v. Medina Auto Parts*, 96 Ohio St.3d 240 (2002). Plaintiff may recover compensatory damages, including lost wages and pain and suffering. Plaintiff may also recover punitive damages. See *Rice v. Certainteed Corp.*, 84 Ohio St.3d 417 (1998); *Preston v. Murty*, 32 Ohio St.3d 334 (1983). If plaintiff recovers punitive damages the factfinder may award attorney fees. *Seppe v. Home Stead Ins. Co.*, 71 Ohio St.3d 552 (1994); *Digital & Analog Design Corp. v. N. Supply Co.*, 63 Ohio St.3d 657 (1992). The court is required on motion of either party to bifurcate the trial and hear the issue of punitive damages separately. R.C. 2315.21. Either party may request a jury trial. Ohio has statutory damage caps that apply to these claims. R.C. 2315.18.

4. Is there any law related to the hiring process?

Yes. Ohio's anti-discrimination statutes prohibiting discrimination apply to the hiring process.

Plaintiffs may recover economic loss, pain, suffering, and punitive damages. If the case merits punitive damages, plaintiffs may recover attorney fees.

5. Does the state recognize implied employment contracts under employment handbooks, policies, or practices?

Yes. Ohio recognizes implied employment contracts. *Hester v. Case Western Reserve University*, 2017-Ohio-103 (8th Dist. 2017). However, consistent with the presumption of at-will employment, the party asserting the claim has a "heavy burden [and] must prove the existence of each element to the formation of the contract." *Penwell v. Amherst Hosp.*, 84 Ohio App.3d 16, 21, 616 N.E.2d 254 (9th Dist. 1992).

6. Does the state have a right to work law or other labor / management laws?

No. Ohio does not have a right to work law. The Ohio legislature has recently introduced a bill that would permit public sector employees to opt out of joining a union or paying dues. *Ohio House Bill 55*.

7. What tort claims are recognized in the employment context?

Several common law torts are frequently pleaded in the employment context. These include: intentional infliction of emotional distress, promissory estoppel and negligent hiring, supervision and retention, defamation, and assault and battery. See, respectively, *Hampel v. Food Ingredients Specialists, Inc.,* 89 Ohio St.3d 169 (2000); *Wing v. Anchor Media, Ltd.,* 59 Ohio St.3d 108 (1991); *Steppe v. Kmart Stores,* 136 Ohio App.3d 454 (8th Dist. 1999); *Davis v. City of Cleveland,* 2004-Ohio-6621 (8th Dist. 2004); and *Arnold v. Burger King,* 2015-Ohio-4485 (8th Dist. 2015). With the exception of promissory estoppel, a plaintiff can recover compensatory damages including lost wages and pain and suffering as well as punitive damages. With regard to promissory estoppel, a plaintiff can recover lost wages. Ohio damage caps apply and a jury trial is available for each of these claims.

8. Is there a common law or statutory prohibition against discrimination / hostile work environment?

Yes. Ohio statutes (R.C. 4112.02, *et seq.*) prohibit discrimination based on race, color, sex, military status, national origin, disability, age, or ancestry, and include claims for discrimination based on hostile work environment. Ohio recognizes a common law claim for sexual harassment based on a hostile work environment. *Kerans v. Porter Paint Co.,* 61 Ohio St.3d 486 (1991). Plaintiffs may recover compensatory damages including pain and suffering and lost wages, as well as punitive damages. The claims for punitive damages will be bifurcated at the request of any party. Ohio's damage caps apply to these claims. A jury trial is available.

9. Is there a common law or statutory prohibition of retaliation?

Yes. R.C. 4112.01 prohibits retaliation in response to discrimination claims. As discussed, R.C. 4113.52 provides protection in specific circumstances for whistleblowers. Also, Ohio prohibits employers from retaliating against an employee for seeking Workers' Compensation benefits. R.C. 4123.90. With the exception of Workers' Compensation retaliation, plaintiffs have a right to a jury trial and may recover damages for lost wages, pain and suffering, as well as punitive damages and attorney fees. For claims of Workers' Compensation retaliation, Ohio law does not permit a jury trial and allows plaintiffs to recover only lost wages and attorney fees.

10. Is the state a deferral state for charges filed with the EEOC?

Yes. See, *Morris v. Engineers*, 1983 Ohio App. LEXIS 12939; R.C. 4112.05.

11. Are there any state laws related to compensation, including wage and hour, paid time off, mandatory breaks, fringe benefits, allowable deductions, prevailing wage rates for public contracts, etc.?

Yes. R.C. 4111.03 to R.C. 4111.17 – The Ohio Minimum Fair Wage Act. The plaintiff is entitled to lost wages and attorney fees.

12. Is there a state statute governing paid or unpaid leaves?

No. There is no state statute governing paid or unpaid leave. However, the provision of the Ohio Administrative Code interpreting the anti-discrimination statute, requires that employers provide leave for child bearing. O.A.C. 4112-5-05-G(6)

13. Is there a state law governing drug-testing?

Yes. R.C. 4123.54(B) permits an employer, who has provided notice, to use an employee's refusal to take a chemical test following a work place injury as evidence that the employee was intoxicated and his negligence was a proximate cause of the injury. This refusal is also just cause for firing the employee. See, *Groves v. Goodyear Tire & Rubber Co.,* 70 Ohio App. 3d 656, 661-2, (1991) (finding that drug testing was in a purely private setting and so the right of privacy did not extend to an employee participating in a drug testing procedure).

14. Is there a medical marijuana statute?

Yes. R.C. 3796.02 *et. seq.* This statute became effective September 8, 2016. It is not scheduled to be fully operational until September 18, 2018. The law permits a patient, on the recommendation of a physician, to use medical marijuana to treat a qualifying medical condition. Nothing in the law requires an employer to accommodate an employee's use or permits a party to sue an employer for taking action related to medical marijuana.

15. Is there trade secret / confidential information protection for employers?

In Ohio, trade secrets are governed by statute. R.C. 1333.61, *et. seq.* In employment disputes, courts do not permit relevant evidence to be withheld based on assertion that the information is a trade secret or confidential. *See* Ohio Civ. Rule 26 providing that, in general, "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject

matter involved in the pending action[.]" *See also Janezic v. Eaton Corp.*, 2013-Ohio-5436, 2013 Ohio App. LEXIS 5684 (refusing to require employer to produce information it considered confidential and which was not relevant).Courts will require the party seeking the information to enter into a confidentiality agreement. The court may also consider a protective order to prevent public disclosure of sensitive information.

16. Is there any law related to employee's privacy rights?

Ohio's anti-discrimination statutes do not protect an employee's privacy rights. *See, Smart v. Ohio Civ. Rights Comm'n,* 2012-Ohio-2899, 2012 Ohio App. LEXIS 2542, at ¶21, (holding that the plaintiff's claims for invasion of privacy, violation of HIPAA, and misuse of medical information do not qualify under the definition of 'Unlawful discriminatory practices' enumerated in R.C. 4112.02). Similarly, an employee does not have a claim for employment discrimination based on an employer's accessing of the employee's work email or voicemail. Finally, Ohio employers may condition employment on the taking of a polygraph and may fire an employee for refusing to take one. *Swolsky Enterprises v. Halterman*, 12 Ohio App.3d 23 (1983).

17. Is there any law restricting arbitration in the employment context?

Generally speaking, Ohio's public policy encourages arbitration as a method to settle disputes. *Schaefer v. Allstate Ins. Co.*, 63 Ohio St.3d 708, 711-712, 590 N.E.2d 1242 (1992); and, R.C. Chapter 2711 – the Ohio Arbitration Act (a trial court, "shall on application of one of the parties, stay the trial of the action until the arbitration of the issue has been had in accordance with the agreement." R.C. 2711.02).

As a result of Ohio's pro-arbitration stance, courts indulge a strong presumption in favor of arbitration when the disputed issue falls within the scope of the arbitration agreement. *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 471, 1998 Ohio 294, 700 N.E.2d 859 (1998); *Taylor Bldg.*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, at ¶ 27. Ohio also holds that arbitration agreements are, "'valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract.'" *Taylor Bldg.* at ¶ 33, quoting R.C. 2711.01(A); *Marmet*, 565 U.S. at 533, 132 S.Ct. at 1204, 182 L.Ed.2d 42.

A court will refuse to compel arbitration in rare cases. See, *Arnold v. Burger King*, 2015Ohio-4485 (supervisor's alleged rape of an employee was independent of the employment relationship and outside the scope the mandatory arbitration agreement).

18. Is there any law governing weapons in the employment context?

Private employers may, but are not required to, prohibit the presence of firearms on their property or in motor vehicles owned by the employer. In addition, the owner or person in control of private land or premises or person leasing land or premises from the government may post a sign in a conspicuous location that prohibits persons from carrying firearms or concealed handguns. R.C. 2923.125, *et. seq.*

Employers are not permitted to establish or enforce a policy that prohibits a concealed handgun licensee from transporting or storing a firearm or ammunition on their property under certain circumstances. For this restriction on employers and property owners to apply, several conditions must be met: 1. the firearm is in the vehicle while the licensee is physically present; or 2. the firearm and ammunition are locked within the trunk, glove box or other enclosed compartment or container within the vehicle; and 3. the vehicle is in a location where it is permitted to be. See R.C. 2923.1210.

19. Miscellaneous employment or labor laws not discussed above?

Ohio statutory law prohibiting discrimination contains a unique trap for the unwary. As noted, Ohio statutes prohibit discrimination based on race, color, sex, military status, national origin, disability, age, or ancestry. With the exception of age, the statute of limitations for these claims is 6 years. O.R.C. 2305.07. With regard to age, however, the statute of limitations is 180 days. O.R.C. 4112.02 (N). To add to the confusion, Ohio has another statutory source for age claims with a statute of limitations of 6 years, but that statute limits damages to lost wages and attorney fees. O.R.C. 4112.14; *see generally, Campolieti v. Cleveland Department of Public Safety*, 2013 –Ohio – 5123 (8th Dist. 2013).

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1. Is the state generally an employment-at-will state?

Oregon is an employment-at-will state through the common law. It has not been codified, but the Oregon Supreme Court recognizes that "the general rule is that an employer may discharge an employee at any time and for any reason, absent a contractual, statutory, or constitutional requirement to the contrary." *Washburn v. Columbia Forest Products, Inc.,* 340 Or 469, 475 (2006). As a result, when employment is at will, typically neither party can expect the employment to continue for any specified period of time. *See Sheets v. Knight*, 308 Or 220, 234 (1989), abrogated on other grounds by *McGanty v. Staudenraus*, 321 Or 532 (1995) ("Because at-will employees may be fired at any time and for any reason, they have no reasonable expectation of continued employment.)"

2. Are there any statutory exceptions to the employment-at-will doctrine?

An exception to Oregon's general rule of at-will employment exists for county employees in non-civil service counties who become permanent employees pursuant to employee handbook. ORS 204.121. *Lawson v. Umatilla County,* 139 F3d 692-693 (1998). In *Laswson*, a terminated county employee brought a §1983 alleging that the county denied him procedural due process. The Court explained that this exception to the at-will employment rule only applies to county civil employees where the county civil service, ORS 241 et. seq, is mandatory, counties with populations over 500,000, and any other counties that elect to have it.

3. Are there any public policy exceptions to the employment-at-will doctrine?

Employers who make promises to their employees or prospective employees regarding at-will employment may be liable for the employees' or prospective employees' damages associated with the employment if they withdraw the offer of employment and the employee or prospective employee has relied on that promise to his or her detriment. *Cocchiara v. Lithia Motors, Inc.*, 353 Or 282, 293 (2013).

4. Is there any law related to the hiring process?

The Oregon Fair Employment Practice Act (ORS 659A.003 et. seq) requires that the abilities should be the measured by his/her fitness and qualification for employment. Employers are prohibited from refusing to hire, barring from employment, terminating, or otherwise discriminating against an individual with respect to compensation or terms, conditions, or privileges of employment based on age. In addition, employers cannot print, circulate, or cause to be printed or circulated any statement, advertisement, or publication, or use any form of application for employment or make any inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification, or discrimination based on age. It is not an unlawful employment practice for an employer to observe the terms of a bona fide seniority system or employee benefit plan so long as the system or plan is not the result of an intent to discriminate based age. For purposes of the Act, age is defined to mean 18 years and older, and an employer is defined as any individual who in the state, directly or through an agent, engages or uses the personal service of one or more employees and reserves the right to control the means by which such service is, or will be, performed.

Employers are expressly prohibited from discriminating against an individual with AIDS or an AIDS-related virus. Informed consent must be obtained before an individual is tested for AIDS. If an employee fails to disclose the test results of an HIV test, his/her employer is not responsible for providing reasonable accommodation for the employee's physical impairment as required under the Oregon Fair Employment Practice Act (ORS 659A.003 et. seq.).

Employers may not exclude job applicants from initial interviews solely because of an applicants' past criminal convictions. If there

is no initial interview, employers cannot require job applicants to disclose their criminal convictions prior to making a conditional offer of employment. The exception to this rule is that applicants may be required to disclose past criminal convictions if required by federal, state, or local law; to law enforcement employers; to employers in the criminal justice system; or to employers seeking non-employee volunteers.

It is an unlawful employment practice for an employer with one or more employees to refuse to hire or promote; limit, segregate, or classify; bar or discharge from employment; or otherwise discriminate with respect to compensation or terms, conditions, or privileges of employment based on the fact an otherwise qualified individual has a disability (for an expansive definition of what qualifies as an disability under the Oregon Fair Employment Practice Act see ORS 659A.104).

Employers are also prohibited from:

- utilizing standards, criteria, or methods of administration that have the effect of discriminating on the basis of disability;
- excluding or otherwise denying equal jobs or benefits to an otherwise qualified person because the person is known to have a relationship or association with a person with a disability;
- failing to make reasonable accommodation for the known physical or mental limitations of an otherwise qualified person with a disability who is an applicant or employee, unless the employer can demonstrate that the accommodation would impose an undue hardship;
- denying employment opportunities to an applicant or employee who is an otherwise qualified person with a disability, if the denial is based on the need of the employer to make reasonable accommodation to the physical or mental impairment of the employee or applicant;
- using qualification standards, employment tests, or other selection criteria that screen out or tend to screen out persons with disabilities, unless the standard, test, or other selection criterion, as used by the employer, is shown to be job-related for the position in question and is consistent with business necessity; and
- failing to select or administer tests relating to employment in the most effective manner to ensure that when the test is administered to an applicant or employee with a disability that impairs sensory, manual, or speaking skills, the test results accurately reflect the skills, aptitude, or other characteristics of the applicant or employee that the test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of the employee or applicant.

These provisions do not limit the ability of an employer to select or administer tests designed to measure the sensory, manual, or speaking skills of an employee or applicant.

It is a discriminatory employment practice against persons with disabilities for employers to conduct medical examinations of applicants, ask applicants whether they have a disability, or ask about the nature or severity of the disability. An employer may ask if an applicant is able to perform job-related functions. An employer may also require a medical examination after an offer of employment has been made, but before the job begins, and condition employment on the results of the examination, if all of the following conditions are met:

- All persons entering employment are subject to the examination, regardless of disability.
- Information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record.
- The results of the examination are used only in a manner consistent with Oregon's disability discrimination law.

An employer may not require that an employee submit to a medical examination, may not inquire whether an employee has a disability, and may not inquire as to the nature or severity of a disability unless the examination or inquiry is shown to be job-related and consistent with business necessity.

Under the Oregon Fair Employment Practice Act, employers are prohibited from refusing to hire, barring from employment, terminating, or otherwise discriminating against an individual with respect to compensation or terms, conditions, or privileges of employment based on marital status or family relationship. In addition, employers cannot print, circulate, or cause to be printed or circulated any statement, advertisement, or publication, or use any form of application for employment or make any inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification, or discrimination based on marital status or family relationship. For purposes of the Act, an employer is defined as any individual who in the state, directly or through an agent, engages or uses the personal service of one or more employees and reserves the right to control the means by which such service is or will be performed.

Under the Oregon Fair Employment Practice Act, employers are prohibited from refusing to hire, barring from employment, terminating, or otherwise discriminating against an individual with respect to compensation or terms, conditions, or privileges of employment based on race or color. In addition, employers cannot print, circulate, or cause to be printed or circulated any statement, advertisement, or publication, or use any form of application for employment or make any inquiry in connection with prospective employment which expresses, directly or indirectly, any limitation, specification, or discrimination based on race or

color. For purposes of the Act, an employer is defined as any individual who in the state, directly or through an agent, engages or uses the personal service of one or more employees and reserves the right to control the means by which such service is or will be performed.

Under the Oregon Fair Employment Practice Act, employers are prohibited from refusing to hire, barring from employment, terminating, or otherwise discriminating against an individual with respect to compensation or terms, conditions, or privileges of employment based on religion. Employers cannot print, circulate, or cause to be printed or circulated any statement, advertisement, or publication, or use any form of application for employment or make any inquiry in connection with prospective employment which expresses, directly or indirectly, any limitation, specification, or discrimination based on religion. Amendments to the Act, known as the Oregon Workplace Religious Freedom Act, require employers to provide reasonable accommodation of the religious practices of an employee, unless doing so would impose an undue hardship. The Act specifically requires employers to permit employees to use leave as an accommodation and prohibits an occupational requirement that restricts the ability of employees to wear religious clothing, take time off for a holy day, or participate in a religious observance or practice. For purposes of the Act, an employer is defined as any individual who in the state, directly or through an agent, engages or uses the personal service of one or more employees and reserves the right to control the means by which such service is or will be performed. In addition, employers are prohibited from discharging, disciplining, or taking any other adverse action against an employee because the employee declines to attend or participate in an employer-sponsored meeting if the primary purpose of the meeting is to communicate the opinion of the employer about religious matters.

Under the Oregon Fair Employment Practice Act, employers are prohibited from refusing to hire, barring from employment, terminating, or otherwise discriminating against an individual with respect to compensation or terms, conditions, or privileges of employment based on sex, unless a bona fide occupational qualification exists. In addition, employers cannot print, circulate, or cause to be printed or circulated any statement, advertisement, or publication, or use any form of application for employment or make any inquiry in connection with prospective employment which expresses, directly or indirectly, any limitation, specification, or discrimination based on sex, unless a bona fide occupational qualification exists. For purposes of the Act, an employer is defined as any individual who in the state, directly or through an agent, engages or uses the personal service of one or more employees and reserves the right to control the means by which such service is or will be performed.

The Oregon Equality Act prohibits employers from refusing to hire or promote, demoting, transferring, disciplining, laying off, or otherwise discriminating against an individual with respect to compensation or terms, conditions, or privileges of employment based on sexual orientation. The Act does not prohibit employers from enforcing otherwise valid dress codes or policies, as long as the employer provides, on a case-by-case basis, reasonable accommodation of an individual based on the health and safety needs of that individual. The Act defines sexual orientation as an individual's actual or perceived heterosexuality, homosexuality, bisexuality, or gender identity, regardless of whether the individual's gender identity, appearance, expression, or behavior differs from that traditionally associated with the individual's sex at birth. An employer is defined as having one or more employees.

5. Does the state recognize implied employment contracts under employment handbooks, policies, or practices?

The right to terminate an at-will employment agreement constitutes an exception to the implied covenant of good faith. Every at-will employment agreement contains an express or implied understanding that either party may terminate the contract for a good reason, a bad reason, or no reason at all; to imply a duty of good faith regarding either party's right to terminate is inconsistent with that express or implied understanding. *Sheets v. Knight*, 308 Or 220, 233 (1989), abrogated on other grounds, *McGanty v. Staudenraus*, 321 Or 532 (1995). In other words, the reasonable expectations of the parties to an at-will employment agreement include the risk that the other party will terminate the agreement without justification.

In fact, because an employer has the "right to modify the terms and conditions of [an at-will employment agreement] prospectively at any time," the duty of good faith and fair dealing is not breached when an employer unilaterally modifies the prospective terms of an employment agreement. *See Duncan v. Office Depot*, 973 F Supp 1171, 1177 (D Or 1997).

If the agreement between the parties restricts either party's right to terminate the contract at will (e.g., requires warnings or a grievance process), the duty of good faith applies to the restrictions just as it does to all the other contractual terms except for the right to terminate per se. *Elliott v. Tektronix, Inc.*, 102 Or App 388, 396 (1990) (issue was whether plaintiff was discharged for conduct that occurred before she was aware of employer's change in attendance policy).

6. Does the state have a right to work law or other labor / management laws?

Oregon has no right-to-work statute or constitutional provision.

7. What are the tort claims recognized in the employment context?

Wrongful Discharge

The Oregon Supreme Court first recognized the tort of wrongful discharge in *Nees v. Hocks*, 272 Or 210, 216 (1975), in which the court recognized an exception to employment at will when the employer's "motive for discharging harms or interferes with an important interest of the community." The court held that when an employer discharges an employee for a "socially undesirable motive," the employer "must respond in damages for any injury done." *Nees*, 272 Or at 218. After the Nees opinion, the court has held that a wrongful discharge claim includes two elements: (1) "there must be a discharge" and (2) "that discharge must be 'wrongful.'" *Moustachetti v. State*, 319 Or 319, 325 (1994).

In *Delaney v. Taco Time International, Inc.*, 297 Or 10, 14–16 (1984), the court organized wrongful-discharge cases into three distinct categories:

(1) Employees discharged for fulfilling societal duties, e.g. jury duty:

(2) Employees discharged for exercising rights of public importance related to their role as employees, e.g. filing a workers compensation action; and

(3) Cases in which an adequate remedy exists to protect society's interest so that an additional remedy of wrongful discharge need not be provided.

The court has recognized a claim for relief for wrongful discharge in the first two categories of cases, but has declined to recognize a claim for wrongful discharge in the third category of cases because a remedy exists that adequately protects society's interests. The lower courts have applied these three analytical categories to decide when a discharge is wrongful.

Invasion of Privacy

Oregon recognizes a right of privacy and a corresponding cause of action for damages arising from a breach of that right. *See Hinish v. Meier & Frank Co.*, 166 Or 482, 506–507 (1941); *Tollefson v. Price*, 247 Or 398, 400 (1967).

In *Anderson v. Fisher Broadcasting Cos.*, 300 Or 452, 459 (1986) (footnote omitted), the court defined the nature of the interest as follows:

"Privacy" denotes a personal or cultural value placed on seclusion or personal control over access to places or things, thoughts or acts. "Privacy" also can be used to label one or more legally recognized interests, and this court has so used the term in several cases since *Hinish*. But like the older word "property," which it partially overlaps, "privacy" has been a difficult legal concept to delimit. Lawyers and theorists debate the nature of the interests that privacy law means to protect, the criteria of wrongful invasions of those interests, and the matching of remedies to the identified interests."

Intentional Infliction of Severe Emotional Distress

The employer and employee are considered to have a special relationship in Oregon. *See Delaney v. Clifton*, 180 Or App 119, 130–131 (2002), in which the court cited *Babick v. Or. Arena Corp.*, 333 Or 401 (2002), as an example of a case in which a special relationship existed between an employer and an employee. A court may consider the existence of a special relationship between the parties in evaluating the conduct that gave rise to the claim for intentional infliction of emotional distress. *Rockhill v. Pollard*, 259 Or 54, 60–61 (1971). In order to bring a claim against an employer for intentional infliction of emotional distress, the employee must meet the following requirements:

(1) "[T]he defendant intended to inflict severe emotional distress on the plaintiff";

(2) "[T]he defendant's acts were the cause of the plaintiff's severe emotional distress"; and

(3) "[T]he defendant's acts constituted an extraordinary transgression of the bounds of socially tolerable conduct". *McGanty v. Staudenraus*, 321 Or 532, 543 (1995) (quoting *Sheets v. Knight*, 308 Or 220 (1989)).

"Any judgment of social standards" requires, in the first instance, an evaluation of whether the conduct in question is favored or made privileged by law, or disfavored or made unlawful by the legislature." House v. Hicks, 218 Or App at 359. "[T]he illegality of conduct is relevant to, but not determinative of, whether the conduct is sufficiently outrageous to support an [intentional infliction of emotional distress] claim." House, 218 Or App at 359.

Wrongful Inference with Economic Relations

"Tort claims for wrongful interference with the economic relationships of another have an ancient lineage." Top Service Body Shop, Inc. v. Allstate Ins. Co., 283 Or 201, 204 (1978). In the twentieth century, the concept of "tortious interference" has become a "fluid" tort theory. Top Service Body Shop, Inc., 283 Or at 204. The concept has been extended to tortious interference with business relations and has been applied in the employment context. Top Service Body Shop, Inc., 283 Or at 204.

The tort of wrongful interference with economic relations requires proof of the following:

(1) The plaintiff had an existing or prospective employment relationship;

(2) Intentional interference with that relationship occurred;

(3) A third party caused the interference;

(4) The interference was accomplished for an improper purpose or through improper means;

(5) A causal effect existed between the interference and damage to the economic relationship; and

(6) The plaintiff suffered damages. McGanty v. Staudenraus, 321 Or 532, 535 (1995); Uptown Heights Associates v. Seafirst Corp., 320 Or 638 (1995). See Straube v. Larson, 287 Or 357, 360–361 (1979); Lewis v. Oregon Beauty Supply Co., 302 Or 616, 621 (1987).

The tort was initially a business tort. Top Service Body Shop, Inc. v. Allstate Ins. Co., 283 Or 201, 204 (1978). It has since been applied in an employment context, and it is becoming increasingly popular.

Defamation

A statement made by an employer regarding an employee either during their scope of employment on in concert with their employment can be seen as defamation in the state of Oregon. "The gravamen of the tort of defamation is the injury to the plaintiff's reputation." Shirley v. Freunscht, 303 Or 234, 238 (1987). To establish a claim for defamation, the employee must prove that the employer published (i.e., communicated to a third person) a defamatory statement concerning the employee. Wallulis v. Dymowski, 323 Or 337, 758 (1996).

Assault and Battery

In *Ballinger v. Klamath Pac. Corp.*, 135 Or App 438, 456 (1995), the court held that an employee's sexual harassment in the workplace that results in battery "is motivated by purely 'personal' desires that are unrelated to serving one's employer" and therefore cannot be imputed to the employer.

If the employee can produce sufficient evidence from which it can be inferred that conduct might be subjectively offensive and taken in the context of a course of conduct that is also objectively offensive, then the question of battery goes to the jury. In *Harris v. Pameco Corp.*, 170 Or App 164, 169–170 (2000), the employee's supervisor (who was a male) began harassing and touching the employee (who was also a male) after learning that homosexuality was contrary to the employee's religious and moral values. Regarding the employee's battery claim, the court rejected the employer's arguments that the employee was hypersensitive to physical conduct between males. The court concluded that it was inferable from the employee's testimony that his supervisor's touching was sexual in nature in light of the employee's previously expressed views about homosexuality and his reactions when he was touched, and that it was also inferable that the supervisor knew his conduct would be considered objectively offensive.

Fraud

If the employee can prove elements of Fraud, then they are allowed to bring this tort against his or her employer. The elements of Fraud are: (1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) the speaker's intent that it should be acted upon by the hearer and in the manner reasonably contemplated, (6) the hearer's ignorance of the falsity, (7) the hearer's reliance on its truth, (8) the hearer's right to rely on the representation, and (9) the hearer's consequent and proximate injury. *Merten v. Portland GE*, 234 Or App 407, 416 (2010).

8. Is there a common law or statutory prohibition against discrimination / hostile work environment?

Serving as a limitation on Oregon's employment-at-will doctrine, Title VII of the Civil Rights Act of 1964, 42 USC §1981, and ORS Chapter 659A provide protections to employees from employment practices motivated by race, color, national origin, sex, or religion. Title VII, 42 USC §2000e, et seq., prohibits classifications and adverse employment actions based on race, color, national origin, sex, or religion. Section 1981 of the Civil Rights Act of 1866 (42 USC §1981) provides that all persons of different race, ancestry, or ethnicity have the same right to enforce contracts and to equal benefit of the law as white citizens. The unlawful employment practices provisions of ORS Chapter 659A prohibit discrimination on the basis of race, color, national origin, religion, or sex, as well as sexual orientation, marital status, age, or expunged juvenile record. *See* ORS 659A.003, 659A.030(1).

Oregon's Pregnancy Discrimination Act, ORS 659A.029, is modeled after 42 USC §2000e(k) and provides that sex discrimination includes discrimination because of "pregnancy, childbirth and related medical conditions or occurrences." *See Cross v. Eastlund*, 103 Or App 138, 141 (1990) (discharge because of pregnancy is discharge "because of sex" under former

ORS 659A.029).

Oregon's Equal Pay Act, ORS 652.220, prohibits sex-based discrimination in wages when work is of comparable character requiring comparable skills. *Portland v. Bureau of Labor and Industries*, 298 Or 104, 109–114 (1984). To make a prima facie case under ORS 652.220(1)(b), an employee must show that: (1) he or she was performing work comparable to that of workers of the opposite sex, and (2) he or she was paid less than those workers. An employee does not have to show that a pay differential was based on sex. *Smith v. Bull Run School Dist.*, 80 Or App 226, 229 (1986).

9. Is there a common law or statutory prohibition of retaliation?

Oregon abides by Title VII of the Civil Rights Act of 1964. Specifically, under Oregon law, it is unlawful for an employer to "discharge, expel or otherwise discriminate" against any person who has opposed any unlawful employment practice, or has "filed a complaint, testified or assisted in any proceeding" under ORS chapter 659A or attempted to do so. ORS 659A.030(1)(f). *Portland State Univ. Chapter of Am. Ass'n of Univ. Professors v. Portland State Univ.*, 352 Or. 697, 706–07 (2012)

10. Is the state a deferral state for charges filed with the EEOC?

Yes, The EEOC defers to the Oregon Bureau of Labor.

11. Are there any state laws related to compensation, including wage and hour, paid time off, mandatory breaks, fringe benefits, allowable deductions, prevailing wage rates for public contracts, etc.?

ORS Chapter 653 regulates minimum wage, overtime, recordkeeping, and child labor. Oregon's minimum wage law, ORS 653.025, establishes a tiered series of annual rate increases that run through June 2022. Beginning July 1, 2023, the minimum wage rate will increase based on the inflation as measured by the Consumer Price Index.

All employees who are not exempt from applicable provisions of the Fair Labor Standards Act (FLSA) and Oregon law must be paid a minimum wage for all hours worked and overtime for all overtime hours. Employment is broadly defined to include all hours that an employee is "suffer[ed] or permit[ted] to work" for the employer. 29 CFR §785.6; ORS 653.010(2).

Employers must provide meal periods of not less than 30 minutes to nonexempt employees who work six or more hours in one work period. If the work period is seven hours or less, the meal period is to be taken between the second and fifth hours worked. If the work period is more than seven hours, the meal period is to be taken between the third and sixth hours worked. Additional meal periods are required to be provided to employees who work 14 hours or more. Ordinarily, employees are required to be relieved of all duties during the meal period. OAR 839-020-0050(2).

Employers regulated by the state minimum wage law must provide employees with paid rest periods of no less than 10 minutes for every four-hour work period or the major part of a four-hour period (more than two hours), to be given approximately in the middle of the work period. Rest periods may not be added to the meal period or taken at the beginning or the end of the workday to shorten the employee's shift. OAR 839-020-0050(6).

On shifts of fewer than five hours, employees 18 years or older who work alone are not required to be given a rest break if they work in retail or service establishments and are allowed sufficient time to use restroom facilities when necessary. OAR 839-020-0050(6)(b).

Oregon minimum wage law allows an employer to deduct the fair value of meals or lodging but not the cost of tools, equipment, uniforms, or clothing required by the employer, or breakage or loss caused by the employee. OAR 839-020-0020. Employers may make deductions only when the employee receives the meals, lodging, or other facilities for the employee's private benefit and their receipt is not a condition of employment. OAR 839-020-0025.

Oregon's prevailing wage rate laws, ORS 279C.800 – 279C.870, apply only to contractors and subcontractors that employ workers on "public works" projects costing more than $50,000. ORS 279C 810(2)(a), 279C.840(1).

12. Is there a state statute governing paid or unpaid leaves?

Employers who employ at least 10 employees in the state of Oregon are required by ORS 653.606(1)(a) to have a sick time policy implemented that allows the employee to accrue one hour of **paid** sick leave for every 30 hours that the employee worked or 1 1/3 hours for every 40 hours the employee works.

Employers who employ less than 10 employees in the state of Oregon are required to have a sick time policy implemented that allows the employee to accrue one hour of **unpaid** sick time for every 30 hours the employee works or 1 1/3 hours for every 40 hours worked. ORS 653.606(1)(b).

Both sections of ORS 653.606 allow the employer to limit the maximum number of hours an employee may accrue to 40 hours per year.

13. Is there a state law governing drug-testing?

There are no Oregon drug testing laws.

14. Is there a medical marijuana statute?

Medical and recreational marijuana are legal in the state of Oregon. ORS 475B et. seq. However, in 2010, the Oregon Supreme Court ruled that an employer has the right to fire an employee who has tested positive for marijuana. *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 348 Or. 159 (2010). There are currently no laws restricting an employer from implementing random drug test in Oregon. Therefore, while marijuana is legal both for medical and recreational purposes in Oregon, an employer can still randomly drug test an employee and fire them for using marijuana.

As of July 2019, there are currently two bills in the Oregon State Legislator, House Bill 2655 and Senate Bill 379, which will address the issue of random drug test and testing employee for marijuana. Both bill are currently in committee for review prior to a vote.

15. Is there trade secret / confidential information protection for employers?

The Oregon Legislature adopted the National Uniform Trade Secrets Act (UTSA) with minor changes. Instead of "willful and malicious" acts required for enhanced awards, the Oregon UTSA says "willful or malicious." ORS 646.467(3). The definition of improper means is narrower, as it excludes reverse engineering and independent development, and the definition of trade secret includes "a drawing, cost data, and customer lists" as examples of potential trade secrets. ORS 646.461(1), (4). Last, the Oregon UTSA omits the requirement that a trade secret may not be "readily ascertainable by proper means" —presumably as superfluous in light of the law's explicit sanction of reverse engineering. UTSA § 1.

16. Is there any law related to employee's privacy rights?

Please see the response to 7(b). An employee who has established a cause of action for invasion of his privacy is entitled to recover damages for:

(a) The harm to his or her interest in privacy resulting from the invasion;

(b) His or her mental distress proved to have been suffered if it is of a kind that normally results from such an invasion; and

(c) Special damage of which the invasion is a legal cause.

17. Is there any law restricting arbitration in the employment context?

An agreement contained in a record to submit to arbitration between an employer and an employee is enforceable and irrevocable unless a law exists that allows for revocation of the contract. ORS 36.620(1). An arbitration agreement entered into between an employer and employee is valid (1) unless, at least 72 hours before the employee's first day, they have received a written agreement that states that there is an arbitration agreement that has the required acknowledgment or the arbitration agreement is entered into at a subsequent advancement of the employee by the employer. ORS 36.620(5). An employer-employee arbitration agreement must have the following language:

"I acknowledge that I have received and read or have had the opportunity to read this arbitration agreement. I understand that this arbitration agreement requires that disputes that involve the matters subject to the agreement be submitted to mediation or arbitration pursuant to the arbitration agreement rather than to a judge and jury in court." ORS 36.620(6).

There must also be a written signature by the employee verifying their agreement to the terms.

18. Is there any law governing weapons in the employment context?

There is no Oregon state law that defines or regulates weapons in the workplace. In the absence of a state law an employer can develop a policy that restricts its employees from possessing weapons on their property. The Oregon Department of Administrative Services' Policy 50-010-05, prohibits weapons in the workplace for state employees unless an employee is expressly permitted to carry, handle, operate or transport a weapon as a part of their employment duties and within the scope of their employment.

19. Miscellaneous employment or labor laws not discussed above?

Oregon's Workers' Compensation Exclusive remedy.

With certain exceptions, the liability of employers and the remedies of employees for "injuries, diseases, symptom complexes or

similar conditions arising out of and in the course of employment" are governed exclusively by Oregon's Workers' Compensation Law (*see* ORS chapter 656). ORS 656.018(1)(a), (2).

The exemption from liability is lost if the injury is caused by the willful act of a person who is otherwise exempt. ORS 656.018(3)(a), 656.156. An employee cannot use the statutory exception in ORS 656.018(3) (exempting willful acts) to support a negligence claim. The exception requires proof of deliberate and intentional conduct. *Harris v. Pameco Corp.*, 170 Or App 164, 174, 12 P3d 524 (2000).

PENNSYLVANIA

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1. Is the state generally an employment-at-will state?

Generally in Pennsylvania, employees are “at-will,” absent a contract or statutory provision, and may be terminated at any time for any or no reason. Stumpp v. Stroudsburg Mun. Auth., 658 A.2d 333, 335 (Pa. 1995)(citing Geary v. United States Steel Corp., 319 A.2d 174 (Pa. 1974)). Similarly, an at-will employee may resign at any time for any reason, or no reason at all. Veno v. Meredith, 515 A.2d 571, 577 (Pa. Super. 1986).

The core of the employment-at-will presumption in this Commonwealth is that the decision to discharge an employee is best left to managerial prerogative and should not be reviewed in a judicial forum. Of course, a discharge may be subject to review in a judicial forum if the employer and employee agree. Veno v. Meredith, 515 A.2d 571, 577 (Pa. Super. 1986).

The most elementary way that the parties can overcome the at-will presumption is by express contract. For example, a contract may be made for a definite term, or it may forbid discharge in the absence of just cause or without first utilizing an internal dispute resolution mechanism. The presumption may also be overcome by implied contract. That is, all circumstances surrounding the hiring process may indicate that the parties did not intend the employment to be "at-will.” Another way that the at-will presumption may be overcome is where the employee gives the employer sufficient consideration in addition to the services for which he was hired.

2. Are there any statutory exceptions to the employment-at-will doctrine?

There are a range of statutory “exceptions,” or legislative restrictions, that prevent an employer from terminating an employee, many of which have specific provisions providing remedies to an employee terminated in violation of the statute. For instance, the following statutory provisions will afford a certain type of employee remedies for certain violations:

a) Under the Pennsylvania Human Relations Act (PHRA), 43 P.S. §§ 951-963 employers with four or more employees are prohibited from discriminating against their employees on the basis of race, color, religious creed, ancestry, age, sex, national origin or nonjob related handicap or disability and use of guide animals, or in retaliation for making a claim. The PHRA further prevents discrimination against an employee or prospective employee based on passing a general educational development test as opposed to a high school diploma.

b) Title VII, 42 U.S.C.A. §§ 2000e-2000e-17 oversees discriminatory adverse employment action based on an individual’s race, color, religion, sex or national origin, or in retaliation for making such claims.

c) The Age Discrimination Employment Act of 1967 (“ADEA”), 29 U.S.C.A. §§ 621-638 prevents adverse employment action on the basis of age, available as a remedy to individuals age 40 and older.

d) The Americans with Disabilities Act of 1990 (“ADA”), 42 U.S.C.A. §§ 12101-22213 generally regulates adverse employment action based on one’s disability or perceived disability, as defined therein.

e) The Family and Medical Leave Act of 1993 (“FMLA”), 29 U.S.C.A. §§ 2601-2654 provides remedies for those applicable employees who suffer adverse employment action for taking “leave” as defined therein.

f) The Genetic Information Nondiscrimination Act of 2008 (“GINA”), 42 U.S.C.A. § 2000ff prevents discrimination based on genetic and certain medical information, effective for health insurance plans May 22, 2010 through May 21, 2010 and employment provisions November 21, 2010.

g) The Pennsylvania Whistleblower Law, 43 Pa. Cons. Stat. Ann. §§ 1421- 1428 prevents adverse employment action for public employees only and entities receiving public funds for reporting fraud and illegal acts, set forth in detail therein.

h) The Medical Care Availability and Reduction of Error Act, 40 Pa. Cons. Stat. Ann. § 1303.308(c) protects health care workers who report the occurrence of a serious incident regarding patient safety from being retaliated against for reporting the incident. This Act sets forth the health care worker’s remedies with all the protections and remedies of the Pennsylvania Whistleblower Law.

i) The Employee Polygraph Protection Act, 29 U.S.C.A. §§ 2001-2010 protects certain employees from adverse employment action for refusing a polygraph examination.

j) The Federal Jury System Improvement Act of 1978 (28 USC 1875) prohibits employers from discharging or taking any other adverse employment action against permanent employees because they perform jury duty in federal court.

k) Protection of Employment of Petit and Grand Jurors, 42 Pa. Cons. Stat. Ann. § 4563 sets out the remedies for an adverse employment action assessed against an employee for serving jury duty by a defined employer.

This is a non-exhaustive list of statutes and authorities.

3. Are there any public policy exceptions to the employment-at-will doctrine?

Pennsylvania recognizes exceptions to the employment-at-will doctrine in only the most limited of circumstances, where discharges of at-will employees would threaten clear mandates of public policy. Clay v. Advanced Computer Applications, Inc., 559 A.2d 917, 918 (Pa. 1989); Geary v. United States Steel Corp., 319 A.2d 174 (Pa. 1974). In ruling on public policy wrongful discharges, the court must first decide if an important public policy is threatened. However, even if an important public policy is threatened, the employer may still discharge the employee if it had a "separate, plausible, and legitimate reason for so doing." This exception tends to be a controversial issue.

Our Commonwealth’s Supreme Court held that in order for the public policy exception to apply to a given termination case, the alleged violation of public policy must be of Pennsylvania public policy, not solely an alleged violation of federal law. McLaughlin v. GastroIntestinal Specialists, 750 A.2d 283 (Pa. 2000). The Superior Court in Hunger v. Grand Central Sanitation, 670 A.2d 173, 175 (Pa. Super. 1996), explained that for an employee to successfully state a public policy exception to the at-will-employment doctrine, “the employee must point to a clear public policy articulated in the constitution, in legislation, an administrative regulation, or a judicial decision.” See also Kelly v. Retirement Pension Plan For Certain Home Office, 73 Fed. Appx. 543 (3d Cir. 2003) (citing McLaughlin, supra, and holding no violation of public policy when employee terminated after objecting to marketing methods arguably in violation of Federal Securities and Exchange Act of 1984); Castro v. Air-Shield, Inc., 78 Bucks Co. L. Rep. 94, 101 (Aug. 20, 2004) (court found no violation of Pennsylvania public policy when former employee cited FDA regulations, stating instead, Pennsylvania public policy is determined by examining Pennsylvania’s Constitution, court decisions and statutes). This is a strict burden for the claimant to plead; it is insufficient for an employee to prove that the employer’s conduct was merely unfair.

An employee is not allowed to bring a wrongful discharge in violation of public policy if there is a statutory remedy available. For example, a wrongful termination claim brought by an employee for racial discrimination will not trigger this exception because the employer’s tortious conduct is governed (and banned) by state and federal statutes outlining’s the employee’s remedies. Further, a claim will fail for cases where an employee is terminated for refusing to perform an act which is believed to in violation of a statute/law, but in fact it is not. See Clark v. Modern Group Ltd., 9 F.3d 321, 328 (3d Cir. 1993); see also Cruz v. Pennridge Reg’l Police Dept., No. CIV.A.02-4372, 2003 U.S. Dist. LEXIS 12962 (E.D. Pa. July 29, 2003).

Damages are recoverable to an employee who successfully brings a claim which falls within the public policy exception as they are allowable under applicable law. Pennsylvania has not carved out damages recoverable for claims uniquely brought under this exception. Jury trials are permitted for claims brought under this exception only so far as the applicable statute provides for such a trial. For example, in Murphy v. Cartex Corp., 546 A.2d 1217 (Pa. Super. 1988), the Superior Court ruled that the trial court erred when it sent the plaintiff’s PHRA portion of the case to a jury, reasoning that the plaintiff did not have a

constitutionally protected right to a jury trial since the rights conferred by statute did not exist at the time the Constitution was adopted. *Id.* The Superior Court also held that the statute (PHRA) refers to legal relief that was equitable in nature, such as "enjoining further unlawful discriminatory practice, ordering reinstatement of hiring of individuals, ordering the upgrading of employees, and awarding back pay. *Id.*

4. Is there any law related to the hiring process?

Pennsylvania requires employers to report all new-hires to the Department of Labor within 20 days from the first day an employee performs services for pay. 23 Pa.C.S §§ 4391, et seq. Re-hires are considered new hires whenever the employee laid off, furloughed, separated or granted leave without pay for more than 30 days, or terminated from employment. 23 Pa.C.S § 4391. The purpose of this law is to locate absent parents in order to enforce child support orders and to identify individuals

fraudulently receiving benefits. 23 Pa.C.S §§ 4392(a) and 4393.

As for employee protection, an employer's wrongful refusal to hire a potential employee is included as an "adverse employment action" within several statues. For example, Pennsylvania's Human Relation Act (the PHRA) operates to protect prospective employees from discrimination on the basis of race, color, religious creed, ancestry, age, sex, national origin, non-job-related handicap or disability, or the use of a guide or support animal because of the blindness, deafness, or physical disability of any individual or independent contractor. 43 Pa. Stat. Ann. § 955.

5. Does the state recognize implied employment contracts under employment handbooks, policies, or practices?

An employee handbook can rebut the at-will employment presumption and be considered an implied employment contract in Pennsylvania in limited situations. In order to rebut this strong presumption, the employee bears the burden of providing clear evidence that the employer intended to form a contract by showing:

a) An agreement for a specific duration (above comments or conduct indicating desire and possibility);

b) An agreement that the employee will be discharged for cause only;

c) Sufficient consideration; or

d) Recognized public policy exception.

See, Luteran v. Loral Fairchild Corp., 688 A.2d 211, 214 (Pa. Super. 2006); Rutherfoord v. Presbyterian-University Hospital, 612 A.2d 500 (Pa. Super. 1992); Marabella v. Borough of Conshohocken, 2016 U.S. Dist. LEXIS 157471, *8 (Ed. Pa. 2016).

The general rules of contracts apply; there must be an offer and acceptance to constitute a contract. The standard is whether a reasonable person in the employee's position would have interpreted the provisions as the employer's intent to discard the at-will rule and be legally bound by the handbook's representations. See, Morosetti v. Louisiana Land & Exploration Co, 564 A.2d 151, 152 (Pa. 1988)(requiring the handbook to represent an intentional offer that is communicated to the employee so a meeting of minds can occur). This is a question for the Court. The Court will not presume that the employer intended an implied employment contract just because a handbook was circulated or that the employee believed or hoped that the handbook was legally binding. Martin v. Capital Cities Media, 511 A.2d 830 (Pa. Super. 1986)(finding that "the handbook is an aspirational statement by the employer listing actions that generally will not be tolerated; it serves as an information function"). See also, Edwards v. Geisinger Clinic, 459 Fed. Appx. 125, 131 (3d. Cir. 2012).

Courts tend to look for additional consideration given by the employee (e.g. provide employer with substantial benefits other than the services hired to perform or undergoes substantial hardship above those duties hired to perform) or the employee has greater bargaining strength than the usual employee. See, Darlington v. General Electric, 504 A.2d 306, 315 (Pa. Super. 1996); Veno v. Meredith, 515 A.2d 571, 580 (Pa. Super. 1986)(holding that the hardship must be beyond those experienced by all salaried professionals); Stumpp v. Stroudsburg Municipal Authority, 658 A.2d 333, ***14, (Pa. 1995)(considering factors such as an increase in workload, hours or burdensome travel); Ciardi v. Laurel Media, Inc., 2012 US Dist. LEXIS 2223, *10-11 (W.D. Pa. 2012)(finding that Plaintiff's relocation from Florida to Pennsylvania in order to perform work duties without the employer's help was sufficient consideration for the creation of an implied contract). The employee must sacrifice more than the minor rights and privileges. See, Scott v. Extracorporeal Inc., 545 A.2d 334 (Pa. Super. 1988)(finding that agreement to a non-compete, confidentiality clause or intellectual rights provisions was not sufficient consideration to rise to a level to rebut the at-will employment relationship).

6. Does the state have a right to work law or other labor / management laws?

Pennsylvania is not a right to work state. Employees identified as part of a certified collective bargaining unit are required to join the Union and pay dues as a condition of employment. However, Pennsylvania does have labor management laws,

including but not limited to:

1. Pennsylvania's Labor Relations Act ("PLRA") supplements the National Labor Relations Act ("NLRA") to extend to workers not covered by federal law. (43 P.S. §§1101.101-1101.2301). The PLRA does not cover employees working for spouses/parents, agricultural laborers, domestic workers, hospitals, charitable institutes and nonprofit social clubs. Generally, Pennsylvania workers have the right to strike. (43 Pa.S. section 211.1 et seq).

2. The Public Employee Relations Act extended collective bargaining rights and obligations to most public employees and their employers. The PERA precludes public employers from engaging in the following unfair labor practices:

a) Interfering, restraining or coercing employees in the exercises of rights under PERA

b) Dominating or interfering with the formation, existence or administration of an employee organization

c) Discrimination to induce or discourage union membership

d) Discrimination or termination of employee because the employee signed or filed an affidavit, petition or complaint, provided information or testimony under PERA.

e) Refusing to bargain collectively in good faith

f) Refusing to reduce a collective bargaining agreement to writing and sign

g) Violating any rules set forth by the board regarding the conduct of representation elections

h) Refusing to comply with the provision of a binding arbitration award

i) Refusing to comply with the requirements of "meet and discuss"

43 P.S. § 1101.1201

3. Act 111 of 1968 granted collective bargaining rights to police officers and firefighters.

4. Act 88 of 1992 (P.L. 30, No. 14) provided for collective bargaining rights to public, private and parochial schools

This is a non-exhaustive list of statutes and authorities.

7. What are the tort claims recognized in the employment context?

a) Intentional Infliction of Emotional Distress

Yes (See e.g., Hoy v. Angelone, 554 Pa. 134 (1998))

Pennsylvania courts have followed the standard under the Restatement (Second) of Torts § 46, which require a plaintiff to show: (1) the conduct must be extreme and outrageous; (2) the conduct must be intentional or reckless; (3) it must cause emotional distress; and (4) the distress must be severe.

Punitive damages available.

Attorneys' fees generally not available in tort claims (See Becker v. Borough of Schuylkill Haven, 200 Pa. Super. 305 (Super. Ct. Pa. 1963)).

Jury trial available.

b) Negligent Infliction of Emotional Distress

Yes (See, e.g., Denton v. Silver Stream Nursing & Rehabilitation Ctr., 739 A.2d 571 (Pa. Super. Ct. 1999))

Pennsylvania courts recognize claims for negligent infliction of emotional distress when a plaintiff is able to prove one of the following four elements: "(1) that the defendant had a contractual or fiduciary duty toward him; (2) that Plaintiff suffered from a physical impact; (3) that Plaintiff was in a 'zone of danger' and at risk of immediate physical injury; or (4) that Plaintiff had a contemporaneous perception of tortious injury to a close relative." (See, e.g., Johnson v. Caputo, 2013 WL 2627064 (E.D. Pa. 2013)).

Punitive damages available.

Attorneys' fees generally not available in tort claims (See Becker v. Borough of Schuylkill Haven, 200 Pa. Super. 305 (Super. Ct. Pa. 1963)).

Jury trial available

c) Assault/Battery

Yes (See e.g., Weaver v. Harpster, 601 Pa. 488 (2009))

Under Pennsylvania law, battery is defined as an intentional "harmful or offensive contact with the person of another" and assault is defined as "an act intended to put another person in reasonable apprehension of an immediate battery, and which succeeds in causing an apprehension of such battery."

Punitive damages available.

Attorneys' fees generally not available in tort claims (See Becker v. Borough of Schuylkill Haven, 200 Pa. Super. 305 (Super. Ct. Pa. 1963)).

Jury trial available.

d) Invasion of Privacy

Yes (See, Rogers v. Int'l Bus. Machines Corp., 500 F.Supp. 867 (W.D. Pa. 1980))

Pennsylvania follows the Restatement (Second) of Torts, § 652 regarding claims for invasion of privacy, which can be established by a showing of

1) unreasonable intrusion upon the seclusion of another, as stated in Section 652 B; or

2) appropriation of the other's name or likeness, as stated in Section 652 C; or

3) unreasonable publicity given to the other's private life as stated in Section 652 D; or

4) publicity that unreasonably places the other in a false light before the public, as stated in Section 652 E.

Punitive damages available.

Attorneys' fees generally not available in tort claims (See Becker v. Borough of Schuylkill Haven, 200 Pa. Super. 305 (Super. Ct. Pa. 1963)).

Jury trial available.

e) Fraud

Yes - Fraudulent Misrepresentation (See, Martin v. Hale Products, 699 A.2d 1283 (Pa. Sup. Ct. 1997))

Lost future income available as damages

Attorneys' fees generally not available in tort claims (See Becker v. Borough of Schuylkill Haven, 200 Pa. Super. 305 (Super. Ct. Pa. 1963)).

Jury trial available

8. Is there a common law or statutory prohibition against discrimination / hostile work environment?

a) Race and Color

See Pennsylvania Human Relations Act below

b) Ethnic/National Origin

See Pennsylvania Human Relations Act below

c) Gender

See Pennsylvania Human Relations Act below

d) Age

See Pennsylvania Human Relations Act below

e) Religion

See Pennsylvania Human Relations Act below

f) Veteran / military status

Pennsylvania Military Leave of Absence Act, 51 P.S. §§ 7301 - 7309

"It is unlawful for the Commonwealth or any of its departments, boards, commissions, agencies or any political subdivision, or for any private employer, to refuse to hire or employ any individual not on extended active duty because of his membership in the National Guard or any one of the other reserve components of the armed forces of the United States, or because he is called or ordered to active State duty or special State duty by the Governor during an emergency or as otherwise authorized by law, or because he is called or ordered to active duty by the Federal Government under provisions of 10 U.S.C. (relating to armed forces) or 32 U.S.C. (relating to National Guard), or to discharge from employment such individual, or to otherwise discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment because of such membership, or because he is called or ordered to active State duty by the Governor during an emergency or because he is called or ordered to other military duty authorized by law."

g) Disability

See Pennsylvania Human Relations Act below

h) Genetic Information

31 Pa. Code § 89.791

i) Sexual Orientation

No

j) Sexual Identity

No

Pennsylvania Human Relations Act, Act 1955 P.L. 744, No. 222, As Amended June 25, 1997 by Act 34 of 1997, 43 P.S. §§ 951-963.

Prohibits "the denial of equal employment, housing and public accommodation opportunities because of…discrimination" based on a group's or an individual's "race, color, familial status, religious creed, ancestry, age, sex, national origin, handicap or disability, use of guide or support animals because of the blindness, deafness or physical handicap of the user or because the user is a handler or trainer of support or guide animals."

Potential damages and remedies include civil penalties.

Attorneys' fees and costs may be awarded to the prevailing party.

Jury trials are not available under the PHRA (See Wertz v. Chapman Township, 559 Pa. 630 (1999)).

9. Is there a common law or statutory prohibition of retaliation?

a) Discrimination Claims.

Under the Pennsylvania Human Relations Act (see above) it is an "unlawful discriminatory practice" to discriminate against an employee who "opposed any practice forbidden" by the Act or "made a charge, testified or assisted" in any proceeding under the Act. (See Question 8 above).

b) Workers' Compensation Claims.

Shick v. Shirey, 716 A.2d 1231, 1233 (Pa. 1998). State Supreme Court held that an at-will employee alleging discharge in retaliation for filing a workers' compensation claim has a cause of action for which relief may be granted under PA law.

Damages available include lost wages and pain and suffering.

c) Military Service.

Under the Pennsylvania Military Affairs Act, 51 Pa.C.S.A. § 7309, it is unlawful for any employer, including the Commonwealth, "to refuse to hire or employ any individual not on extended active duty because of his membership in the National Guard or any one of the other reserve components of the armed forces of the United States, or because he is called or ordered to active State duty or special State duty by the Governor during an emergency or as otherwise authorized by law, or because he is called or ordered to active duty by the Federal Government under provisions of 10 U.S.C. (relating to armed forces) or 32 U.S.C. (relating to National Guard), or to discharge from employment such individual, or to otherwise discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment because of such membership, or because he is called or ordered to active State duty by the Governor during an emergency or because he is called or ordered to other military duty authorized by law." Further, "upon

the completion of such emergency or other military duty any such member of the Pennsylvania National Guard or any other reserve component of the armed forces of the United States shall be restored by such public or private employer or his successor in interest to such position or to a position of like seniority, status and pay which such member held prior to such emergency or other military duty, but if any such member is not qualified to perform the duties of such position by reason of disability sustained during such emergency or other military duty but qualified to perform the duties of any other position in the employ of such private employer or his successor in interest, such member shall be restored to such other position, the duties of which he is qualified to perform, as will provide him like seniority, status and pay, or the nearest approximation thereof consistent with the circumstances of the case, unless such public or private employer's or his successor in interests, circumstances have so changed as to make it impossible or unreasonable to do so."

Jury trials are not available (See Ryan v. Berwick Industries, Inc., 30 F.Supp.2d 834 (M.D. Pa. 1998)).

The PMAA mirrors USERRA, which provides for compensatory damages, liquidated damages in the case of willful

violations, and attorneys' fees but not punitive damages. (See Hamovitz v. Santa Barbara Applied Research, Inc., 2010 WL 1337713, FN 16 (W.D. Pa. 2010)).

d) Political Activities.

None (but employees may be protected by the First Amendment to the U.S. Constitution in certain circumstances)

e) Medical Leaves.

None.

f) Maternity/Paternity Leaves.

None (although the PHRA's protection of employees based on sex includes pregnancy, childbirth, and other related medical conditions).

g) Whistle Blowing.

Pennsylvania Whistleblower Law, 43 Pa.C.S. §§ 1421-1428

Under the statute, public employees and employees of private employers that receive grants or funding from government sources, who make good faith reports of waste or wrongdoing, or are asked by the authorities to participate in an investigation, hearing, or court action, are protected from being discharged or retaliated against. Some Pennsylvania courts have held that there is no right to a jury trial. Successful claimants could be awarded reinstatement and back pay. Courts may award attorneys' fees and costs and impose fines of up to $500 on employers.

h) Safety Complaints.

See subsection (g) above regarding Whistle Blowing.

i) Voting.

None.

j) Jury Duty/Court Attendance.

Protection of Employment of Petit and Grand Jurors - 42 Pa.C.S.A. § 4563. Under the statute, "an employer shall not deprive an employee of his employment, seniority position or benefits, or threaten or otherwise coerce him with respect thereto, because the employee receives a summons, responds thereto, serves as a juror or attends court for prospective jury service." This does not apply to "any employer in any retail or service industry employing fewer than 15 persons or any employer in any manufacturing industry employing fewer than 40 persons." An individual who would not be entitled to reinstatement under the statute shall, upon request to the court, be excused from jury service.

Compensatory damages, reinstatement, and attorneys' fees are available.

k) Public Conduct Not Associated with Employment.

None.

l) Private Conduct Not Associated with Employment.

None.

10. Is the state a deferral state for charges filed with the EEOC?

Yes.

11. Are there any state laws related to compensation, including wage and hour, paid time off, mandatory breaks, fringe benefits, allowable deductions, prevailing wage rates for public contracts, etc.?

a) Pennsylvania Wage Payment and Collection Law, 43 P.S. § 260.1 et. seq.; creates a statutory right to wages that have been earned; attorneys' fees are available in addition to unpaid wages and liquidated damages; jury trial available.

b) Pennsylvania Minimum Wage Law, 43 P.S. § § 333.101—333.115; establishes a fixed minimum wage and overtime rate; attorney's fees are available in addition to back wages and liquidated damages; jury trial available.

c) Pennsylvania Equal Pay Law, 43 P.S. § § 336.1 – 336.10; prohibits discrimination in compensation of employees based on sex for work under equal conditions which requires equal skill; attorney's fees are available in addition to unpaid wages and liquidated damages; jury trial available.

12. Is there a state statute governing paid or unpaid leaves?

a) Medical

Pennsylvania has no "baby FMLA" statute. A medical leave for recuperation or treatment might be a form of reasonableaccommodation under the Pennsylvania Human Relations Act (PHRA), 43 P.S. §§ 951-963. See, e.g., Schneider v. Works, 223 F. Supp. 3d 308, 317 (E.D. Pa. 2016) (Requests for limited periods of medical leave are considered reasonable accommodations under the ADA and PHRA, whereas requests for indefinite medical leave are not reasonable). Damages under the PHRA include injunctive relief, reinstatement, back pay, or any other legal or equitable relief as the court deems appropriate, and attorneys' fees. There is no trial by jury under the PHRA.

b) Maternity/Paternity

Pennsylvania has no "baby FMLA" statute. A maternity or paternity leave may be required through application of the non-discrimination provisions of the Pennsylvania Human Relations Act (PHRA), 43 P.S. §§ 951-963. The disability portion of pregnancy should be treated no less favorably than the employer treats other disabilities, a principle from which a right to a medical maternity leave may be derived. See, e.g., Cerra v. East Stroudsburg Area School District, 450 Pa. 207, 213, 299 A.2d 277, 280 (1973) (requirement that teacher resign after fifth month of pregnancy, when "[m]ale teachers, who might well be temporarily disabled from a multitude of illnesses, have not and will not be so harshly treated" constituted sex discrimination prohibited by PHRA). To the extent an employer permits maternity leave for non-medical reasons such as bonding and child rearing, an employer must provide a similar leave to male employees. See, e.g., Schafer v. Board of Public Education of the School District of Pittsburgh, 903 F.2d 243 (3d. Cir. 1990). There is no trial by jury under the PHRA.

c) Military

Pennsylvania has a state military leave statute, the Pennsylvania Military Leave of Absence Act (the "PMLAA"), See,51 Pa. Stat. Ann. §§ 7301-7309, which supplements the federal law relating to military leaves, the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C.A. §§ 4301 et seq. Under the Pennsylvania statute, the definition of "employee" (at Section 7301) includes most public employees: "Any appointed officer or employee regularly employed by the Commonwealth, in its civil service or otherwise, or by any department, board, bureau, commission, authority, agency or office thereof, or by any political subdivision or local authority of the Commonwealth, but … not … any employee of any school district or vocational school district." Section 7302 provides a right to a military leave to employees who in time of war or armed conflict, or emergency proclaimed by the Governor or by the President of the United States, enlist or are drafted, or for reservists who are ordered to active duty. "So long as an employee is on military leave of absence, he shall not be removed from his employment and his duties shall either be performed by other employees or by a temporary substitute." 51 Pa. Stat. Ann. § 7302(a).

13. Is there a state law governing drug-testing?

Pennsylvania has no state statute governing drug testing.

An unemployment compensation claimant is ineligible for benefits if unemployed due to failure to submit to or pass a drug test. 43 Pa. Stat. Ann. § 802(e.1) ("An employee shall be ineligible for compensation for any week … In which his unemployment is due to discharge or temporary suspension from work due to failure to submit and/or pass a drug test conducted pursuant to an employer's established substance abuse policy, provided that the drug test is not requested or implemented in violation of the

law or of a collective bargaining agreement.")

A workers' compensation claimant is ineligible for benefits for injury or death caused by the claimant's illegal act, including illegal drug use. 77 Pa. Stat Ann. § 431 ("Every employer shall be liable for compensation for personal injury to, or for the death of each employee, by an injury in the course of his employment, … Provided, That no compensation shall be paid when the injury or death … is caused by the employee's violation of law, including, but not limited to, the illegal use of drugs, but the burden of proof of such fact shall be upon the employer, ….")

14. Is there a medical marijuana statute?

Pennsylvania has joined a handful of jurisdictions, including Delaware and Connecticut, which prohibit employment discrimination against employees who use medical marijuana. The PA. Medical Marijuana Act ("the Act") prohibits employers from discharging, threatening, refusing to hire, discriminating or retaliating against employees "solely on the basis of such employee status as an individual who is certified to use medical marijuana." In other words, taking adverse action against an individual merely because they are certified medical marijuana cardholder would likely be considered discrimination. The law is silent as to whether an employer can rely upon a positive drug test as a reason for adverse employment action in and of itself, or as evidence of impairment. While the Act provides some protection for employers with employees in safety sensitive positions, it creates new practical problems for Pennsylvania employers in the drug testing process.

Because the Act is in direct conflict with federal law, the Anti-Discrimination Provisions will likely be subject to legal challenge. Unfortunately, until then, employers must navigate this issue carefully. This would include affirmative steps to bolster drug-free workplace policies through education of the employees and open discussion and communication as to how medical marijuana in the workplace will be treated. Accordingly, it is prudent for employers to have individual discussions with any employee taking medical marijuana to manage expectations and alleviate misunderstandings.

Pennsylvania Law does not prevent employers from periodic random drug testing, nor are they required to permit the use of medical marijuana on their property. An employer may discipline an employee that is under the influence of marijuana in the workplace for his performance if, while under the influence of marijuana, performance is below what is expected.

If a person tests positive then the employer may determine if the person is a certified user based on representations of the employee during the interview process and the documentation in the individual's employment file. If a person is not certified, an employer may discipline or fire as appropriate. If the individual is a certified user then the employer needs to determine if the person was "under the influence" of marijuana in the workplace.

At present, there is little guidance in the Act as to what constitutes a finding of "under the influence" as it relates to medical marijuana. An employer may still rely on traditional ways to determine if someone is under the influence based on their appearance, eyes, coordination, speech, performance, negligence, etc. As with any types of employment action the employee's actions which form the basis of the supervisor's response must be appropriately documented and the identity of any witnesses should be maintained to assist in the defense of the possible subsequent employee challenges to either the test or the action taken as a result thereof.

15. Is there trade secret / confidential information protection for employers?

Pennsylvania has adopted its version of the Uniform Trade Secrets Act ("UTSA"), at 12 Pa. Cons. Stat. Ann. §§ 5310 through 5308. The Pa. UTSA displaces conflicting tort, restitutionary and other Pennsylvania law providing civil remedies for misappropriation of a trade secret, but does not affect contractual remedies, whether or not based upon misappropriation of a trade secret, other civil remedies that are not based upon misappropriation of a trade secret; or criminal remedies, whether or not based upon misappropriation of a trade secret. 12 Pa. Cons. Stat. Ann. § 5308. Under the Pa. UTSA, a plaintiff may seek to enjoin or recover monetary damages for "misappropriation, defined at 12 Pa. Cons. Stat. Ann. § 5302. An action for misappropriation has a limitations period of three years. For an example of a case in which an executive was enjoined from going to work for a competitor to prevent threatened misappropriation of trade secrets. See Bimbo Bakeries USA, Inc. v. Botticella, 613 F.3d 102, (3d Cir. 2010.)

16. Is there any law related to employee's privacy rights?

a) Social Media Privacy

Pennsylvania Law does not specify whether an employee's lawful, off duty, online activities are protected. Unless there is a contract, Pennsylvania is an "employment at-will" state, which means subject to certain exceptions such as discrimination or violations of public policy, "as a general rule, employees are at-will, absent a contract, and may be terminated at any time, for any reason or for no reason." Stumpp v. Stroudsburg Municipal Authority 540 Pa. 391, 396 (1995).

Pennsylvania has considered certain protections for employee social media. In 2012, House Bill 2332 or the "Social Media

Privacy Protection Act," was proposed and referred to the Committee on Labor and Industry. This bill would prevent employers from requesting or requiring an employee or prospective employee to disclose a user name, password or other means for accessing a private or personal social media account, service or Internet website. The Bill prevents an employer from firing or refusing to hire an employee for declining to provide this information.

As previously stated, Pennsylvania has no specific piece of legislation or case law regarding an employee's right to privacy as it pertains to social media. However, this topic has gained momentum around the country, particularly with the National Labor Relations Board. The NLRB has issued guidelines for an employer's social media policies and created a nine-prong "totality of the circumstances" test to assess the protection given to an employee's social media conduct. Such factors include, the subject matter of the conduct, whether the employer considered similar conduct offensive, and the location of the conduct. The Second Circuit recently affirmed the nine prong test in NLRB v. Pier Sixty, LLC, No. 15-1841 (2d Cir. April 21, 2017).

b) HIV and Mental Health

The disclosure of HIV-related information is controlled by the Confidentiality of HIV-Related Information Act codified at 35 P.S. 7601 (Act 148 of 1990). An employer has no express right to HIV-related information without consent from the employee that must comply with the provision of the Act. An employer can seek court permission but must demonstrate a compelling need for the disclosure that cannot be accomplished in another manner. An employer could also be civilly liable

should HIV-related information be obtained and disclosed to a third party. Similarly, Mental Health disclosures are governed by 55 Pa. Code 5100.31 et. seq. There are specific requirements for a release of information to a third party such as an employer. The Code requires disclosure of only the information that is relevant to the requestors needs.

c) Polygraph Tests

Pennsylvania has enacted a statute prohibiting employers from requiring employees to submit to a polygraph or similar test as a condition of employment or continuation of employment. The statue criminalizes this activity by an employer. See, 18 Pa.C.S.A. § 7321, quoted below:

> 1. Offense defined.--A person is guilty of a misdemeanor of the second degree if he requires as a condition for employment or continuation of employment that an employee or other individual shall take a polygraph test or any form of a mechanical or electrical lie detector test.
>
> 2. Exception.--The provisions of subsection (a) of this section shall not apply to employees or other individuals in the field of public law enforcement or who dispense or have access to narcotics or dangerous drugs.

Pennsylvania courts have grounded wrongful termination claims on the public policy enunciated in 18 Pa. C.S.A. § 7321. See, e.g., Kroen v. Bedway Security Agency, Inc., 633 A.2d 628, 430 Pa.Super. 83 (1993).

d) Pa. Wiretapping and Electronic Surveillance Control Act.

Pennsylvania has enacted the "Wiretapping and Electronic Surveillance Control Act," 18 Pa. C.S.A. §§ 5701 through 5782. The statute provides that, unless an exception applies, it is a third degree felony for a person to: (1) intentionally intercept a wire, electronic or oral communication; (2) intentionally disclose to any other person the contents of any wire, electronic or oral communication, or evidence derived from it, knowing or having reason to know that the information was obtained through the interception of a wire, electronic or oral communication; or (3) intentionally use the contents of any wire, electronic or oral communication, or evidence derived therefrom, knowing or having reason to know, that the information was obtained through the interception of a wire, electronic or oral communication. See, 18 Pa. Stat. and Cons. Stat. Ann. § 5703.

Generally, unless another exception applies, all parties to the communication must have given prior consent for the interception of the communication to not violate the wiretap law. 18 Pa. Stat. and Cons. Stat. Ann. § 5704(4). Pennsylvania is therefore considered to be one of a number of "two party consent" jurisdictions for proper interception of a communication. Other exceptions (and the specific requirements for meeting them) are identified in Section 5704, including an exception applicable to operators of switchboards, and an exception applicable to businesses engaged in telephone marketing or customer service.

In addition to criminal penalties, the statue provides a private right of action for "any person whose wire, electronic or oral communication is intercepted, disclosed or used in violation of this chapter..." 18 Pa. C.S.A. § 5725. The potential recovery includes actual damages but not less than liquidated damages as specified, punitive damages, and attorneys' fees.

e) Wrongful termination

In Smyth v. Pillsbury Company Co., 914 F. Supp. 97 (E.D. Pa. 1996), an employee whose company emails were used as

the basis for his termination sought to recover on a wrongful termination theory, arguing that the employer's assurances of privacy in the emails created an expectation of privacy and that the employer's decision to terminate him violated the public policy of protecting his privacy interest. He did not bring an invasion of privacy claim. The court rejected his wrongful termination claim.

17. Is there any law restricting arbitration in the employment context?

Pennsylvania has no law specifically addressing arbitration in the employment context.

18. Miscellaneous employment or labor laws not discussed above?

a) Personnel Files

Pennsylvania has enacted the Personnel Files Act, defining a "personnel file" as follows:

If maintained by the employer, any application for employment, wage or salary information, notices of commendations, warning or discipline, authorization for a deduction or withholding of pay, fringe benefit information, leave records, employment history with the employer, including salary information, job title, dates of changes, retirement record, attendance records and performance evaluations. The term "personnel file" shall not include records of an employee relating to the investigation of a possible criminal offense, letters of reference, documents which are being developed or prepared for use in civil, criminal or grievance procedures, medical records or materials which are used by the employer to plan for future operations or information available to the employee under the Fair Credit Reporting Act (84 Stat. 1127-1136,

15 U.S.C. § 1681 et seq.)

43 Pa. Stat. Ann. § 1321 (Definition of "personnel file").

The statute permits existing employees, or their agents, access to review the personnel file at reasonable times, during business hours, at the employer's premises, under employer supervision. The specific conditions attached to the request are spelled out in 43 Pa. Stat. Ann. §§ 1322, 1323, and 1324. These rights include the right to take notes from the file, but not a right to make copies of material in the file. The Pennsylvania Supreme Court recently ruled that former employees do not have a right to inspect their personnel files under the statute. Thomas Jefferson University Hospitals, Inc. v. Pennsylvania Department of Labor & Indus., No. 30 EAP 2016, 2017 WL 2651980, at *6 (Pa. June 20, 2017). The statute is administered by the Department of Labor and Industry, Bureau of Labor Standards. 43 Pa. Stat. Ann. § 1324.

b) Non-Competes and Restrictive Covenants

In Pennsylvania, there is no specific statute that addresses non-compete or restrictive covenants. The legality of such agreements is evaluated by the courts. At a minimum, the non-compete clause must be reasonably related to the protection of a legitimate business interest. If the agreement meets this threshold, the courts then evaluate the reasonableness of the clause by balancing the following factors:

1. Protection of employer's legitimate business interest;
2. Employee's right to earn a living;
3. Geographical limitation imposed upon employee;
4. Duration of limitation imposed upon employee.

Hess v. Gebhard & Co., 570 Pa. 148 (2002) and Wellspan Health v. Bayliss, 869 A.2d 990 (Pa. Super. Ct. 2005).

The covenant must also be supported by consideration, i.e. the employee receives some corresponding benefit in exchange for agreeing to the non-compete. This requirement is satisfied when a new employee signs the covenant in exchange for employment. Non-compete clauses that are entered into by an existing employee, however, must be accompanied by some beneficial change in the employee's status. Pennsylvania courts have recognized that a salary increase, a bonus or other changes to the employee's compensation package are sufficient consideration. See generally, Socko v. Mid-Atl. Sys. of CPA, Inc., 633 Pa. 555 (2015)

There is no specific rule on a "reasonable" geographic or time limitation. Instead, Pennsylvania courts have "blue pencil authority" to modify unreasonable or offensive portions of the covenant. Sungard Bus. Sys., LLC v. McCloskey, 34 Pa. D. & C.5th 181 (C.P. 2013). Accordingly, a court can reduce the geographical or duration scope of the covenant as it sees fit under the circumstances. Bahleda v. Hankison Corp., 228 Pa. Super. 153 (1974). This is a unique power of the courts that stems from its powers in equity. Barb-Lee Mobile Frame Co. v. Hoot, 416 Pa. 222 (1965). If the clause contains no limitations on the territory covered, or alternatively, contains no time limit, the courts can sustain the clause if they can interpret a reasonable limitation based on the realities of the situation. Seligman & Latz of Pittsburgh, Inc. v. Vernillo, 382

Pa. 161 (1955). However, enforcement of the clause is prohibited if the covenant is so overly broad that its clear intent was to oppress the employee. Sidco Paper Co. v. Aaron, 465 Pa. 586 (1976).

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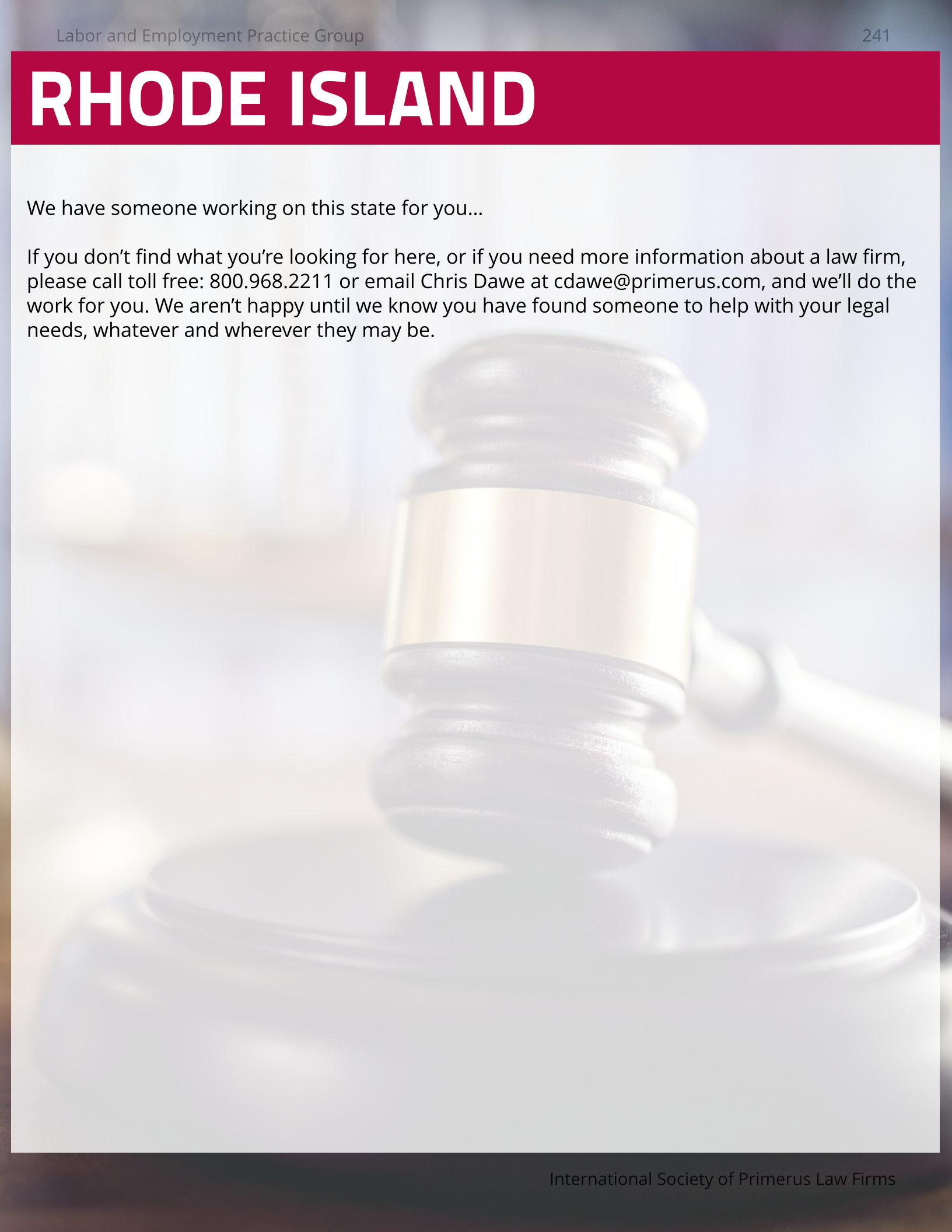

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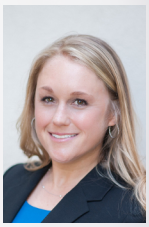

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1. Is the state generally an employment-at-will state?

Yes. In South Carolina, employment at-will is presumed absent the creation of a specific contract of employment. Mathis v. Brown & Brown of S.C., Inc., 389 S.C. 299, 310, 698 S.E.2d 773, 778 (2010). An at-will employee may be terminated at any time for any reason or for no reason, with or without cause. Id.

2. Are there any statutory exceptions to the employment-at-will doctrine?

S.C. Code Ann. § 63-17-2180. Employer prohibited actions against employee.

An employer is prohibited from discharging, refusing to employ, or taking other disciplinary action against a person because of an income withholding order for health coverage. The person has the burden of proving that income withholding for health coverage was the sole reason for the employer's action.

S.C. Code Ann. § 16-17-560. Assault or intimidation on account of political opinions or exercise of civil rights.

It is unlawful for a person to assault or intimidate a citizen, discharge a citizen from employment or occupation, or eject a citizen from a rented house, land, or other property because of political opinions or the exercise of political rights and privileges guaranteed to every citizen by the Constitution and laws of the United States or by the Constitution and laws of this State.

A person who violates the provisions of this section is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than two years, or both.

S.C. Code Ann. § 41-1-70. Liability of employer for dismissal or demotion of employee who complies with subpoena or serves on jury.

Any employer who dismisses or demotes an employee because the employee complies with a valid subpoena to testify in a court proceeding or administrative proceeding or to serve on a jury of any court is subject to a civil action in the circuit court for damages caused by the dismissal or demotion.

Damages for dismissal are limited to no more than one year's salary or fifty-two weeks of wages based on a forty-hour week in the amount the employee was receiving at the time of receipt of the subpoena.

S.C. Code Ann. § 41-1-80. Prohibition against retaliation based upon employee's institution of, or participation in, proceedings under Workers' Compensation Law; civil actions.

No employer may discharge or demote any employee because the employee has instituted or caused to be instituted, in good faith, any proceeding under the South Carolina Workers' Compensation Law (Title 42 of the 1976 Code), or has testified or is about to testify in any such proceeding.

Any employer who violates any provision of this section is liable in a civil action for lost wages suffered by an employee as a result of the violation, and an employee discharged or demoted in violation of this section is entitled to be reinstated to his former position. The burden of proof is upon the employee.

Any employer shall have as an affirmative defense to this section the following: wilful or habitual tardiness or absence from work; being disorderly or intoxicated while at work; destruction of any of the employer's property; failure to meet established employer work standards; malingering; embezzlement or larceny of the employer's property; violating specific

written company policy for which the action is a stated remedy of the violation.

The failure of an employer to continue to employ, either in employment or at the employee's previous level of employment, an employee who receives compensation for total permanent disability, is in no manner to be considered a violation of this section.

The statute of limitations for actions under this section is one year.

S.C. Code Ann. § 41-1-30. Terminating authorized worker and replacing with unauthorized alien; wrongful termination action by discharged employee.

(A) There is a civil right of action for wrongful termination against an employer who discharges an employee authorized to work in the United States for the purpose of replacing that employee with a person the employer knows or should reasonably know is an unauthorized alien.

(B) An aggrieved employee must show all of the following:

(a) the replacement occurred within sixty days of the date of the employee's termination;

(b) the replacement worker was an unauthorized alien at the time of the replacement;

(c) the employer knew or reasonably should have known of the replacement worker's status; and

(d) the replacement worker filled duties and responsibilities the employee vacated.

(C) This section does not create an employment contract for either a public or private employer.

(D) An employee who brings a civil suit pursuant to this section is limited to the following recovery:

(1) reinstatement to his former position;

(2) actual damages; and

(3) lost wages.

(E) A cause of action does not arise against an employer who submits the necessary identifying information for all employees through the Systematic Alien Verification of Entitlement (SAVE) program, the E-Verify Program or a successor program used for verification of work authorization and operated by the United States Department of Homeland Security.

(F) Any cause of action arising pursuant to this section is equitable in nature and must be brought within one year of the date of the alleged violation.

(G) For any action brought pursuant to this section, the court may award attorney fees to the prevailing party.

(H) The provisions of this section do not apply to a private employer who terminates an employee to comply withthe provisions of Chapter 8 of Title 41.

§ 41-1-85. Personnel action based on use of tobacco products outside of workplace prohibited.

The use of tobacco products outside the workplace must not be the basis of personnel action, including, but not limited to, employment, termination, demotion, or promotion of an employee.

3. Are there any public policy exceptions to the employment-at-will doctrine?

Yes. The following excerpt is taken from Barron v. Labor Finders of S.C., 393 S.C. 609, 614–15, 713 S.E.2d 634, 636–37 (2011):

Under the "public policy exception" to the at-will employment doctrine, however, an at-will employee has a cause of action in tort for wrongful termination where there is a retaliatory termination of the at-will employee in violation of a clear mandate of public policy. Ludwick v. This Minute of Carolina, Inc., 287 S.C. 219, 337 S.E.2d 213 (1985). The public policy exception clearly applies in cases where either: (1) the employer requires the employee to violate the law, Ludwick, supra, or (2) the reason for the employee's termination itself is a violation of criminal law. Culler v. Blue Ridge Elec. Co-op., Inc., 309 S.C. 243, 422 S.E.2d 91 (1992) (employee was terminated after he refused to contribute to political action fund, and his termination violated S.C. Code Ann. § 16–17–560).

While the public policy exception applies to situations where an employer requires an employee to violate the law or the reason for the termination itself is a violation of criminal law, the public policy exception is not limited to these situations. See Garner v. Morrison Knudsen Corp., 318 S.C. 223, 456 S.E.2d 907 (1995); Keiger v. Citgo, Coastal Petroleum, Inc., 326 S.C. 369, 482 S.E.2d 792 (Ct. App. 1997). In both of these cases, the courts declined to address whether the public

policy exception applied because, in their procedural posture, it was not appropriate to decide the novel issue without further developing the facts of the case. Garner, 318 S.C. at 227 n. 3, 456 S.E.2d at 910 n. 3 (appeal from a grant of a

12(b)(6), SCRCP, motion to dismiss); Keiger, 326 S.C. at 373, 482 S.E.2d at 794 (same). Both cases make clear, however, that an at-will employee may have a cause of action for wrongful termination even if the discharge itself did not violate criminal law or the employer did not require the employee to violate the law.

The public policy exception does not, however, extend to situations where the employee has an existing statutory remedy for wrongful termination. See Dockins v. Ingles Markets, Inc., 306 S.C. 496, 413 S.E.2d 18 (1992) (employee allegedly terminated in retaliation for filing complaint under Fair Labor Standards Act had existing statutory remedy for wrongful termination); see also Epps v. Clarendon County, 304 S.C. 424, 405 S.E.2d 386 (1991) (employee had an existing remedy for wrongful termination under Title 42 U.S.C. § 1983).

4. Is there any law related to the hiring process?

a. Immigration

All employers must enroll in and use E-Verify to verify the employment authorization of new employees. S.C. Code Ann. §§ 8-14-20(A) (public employers and contractors); 41-8-20(b) (private employers).

Individuals who are not considered “employees” under South Carolina law are not subject to E-Verify. An “employee” is defined as an individual who receives “wages,” as defined by section 12-8-520. S.C. Code § 12-8-10(3). “Wages” are statutorily defined to exclude agricultural work.

An employer that knowingly employs an unauthorized worker violates that employer's right to do business in South Carolina. S.C. Code Ann. § 41-8-30. However, an employer who in good faith verifies the employment eligibility of a new employee will be presumed to have complied with the provisions requiring E-Verify participation. S.C. Code Ann. § 41-8-40.

Additional information can be located here: http://www.llr.state.sc.us/Immigration/

b. Recruitment/Advertisement

c. Applications

d. Background

There are no state statutory restrictions on an employer’s use of arrest records, conviction records, or sealed/expunged criminal records.

e. Credit history

There are no state statutory provisions concerning credit checks or the use of credit information or credit history.

f. Medical history

Medical examinations and inquiries in the context of employment are governed by S.C. Code Ann. § 1-13-85.

g. Employment history

h. Notification to unsuccessful applicants

i. Offers of employment

5. Does the state recognize implied employment contracts under employment handbooks, policies, or practices?

S.C. Code Ann. § 41-1-110. Conspicuous disclaimer of contract of employment created by handbook, personnel manual or other document issued by employer.

It is the public policy of this State that a handbook, personnel manual, policy, procedure, or other document issued by an employer or its agent after June 30, 2004, shall not create an express or implied contract of employment if it is conspicuously disclaimed. For purposes of this section, a disclaimer in a handbook or personnel manual must be in underlined capital letters on the first page of the document and signed by the employee. For all other documents referenced in this section, the disclaimer must be in underlined capital letters on the first page of the document. Whether or not a disclaimer is conspicuous is a question of law.

6. Does the state have a right to work law or other labor / management laws?

Yes, see S.C. Code Ann. § 41-7-10, et. seq.; *However, 2017 South Carolina House Bill No. 3029, South Carolina One Hundred Twenty-Second Session General Assembly was introduced on January 10, 2017 proposing repealing Chapter 7, Title 41 relating to the Right to Work.*

7. What tort claims are recognized in the employment context?

In Angus v. Burroughs & Chapin Co, the South Carolina Supreme Court held that "an at-will employee may not maintain a **civil conspiracy** action against her employer. . . . Where the employment is at-will, the employee may be terminated "at any time for any reason or for no reason at all." 368 S.C. 167, 170, 628 S.E.2d 261, 262 (2006) (quoting Ross v. Life Ins. Co. of Virginia, 273 S.C. 764, 765, 259 S.E.2d 814 (1979)).

8. Is there a common law or statutory prohibition against discrimination / hostile work environment?

S.C. Code Ann. § 1-13-80 prohibits employers, employment agencies, labor organizations, and joint labor-management committees ("covered entities") discriminate against an individual with respect to the individual's compensation or terms, conditions, or privileges of employment because of the individual's race, religion, color, sex, age, national origin, or disability. Subsection (D) requires covered entities to make reasonable accommodations to individuals with disabilities (unless the accommodations would impose undue hardship) and prohibits the use of qualification standards, employment tests, or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job related for the position in question and is consistent with business necessity. There are numerous other exceptions, restrictions, prohibitions, and requirements contained within that statute. The enforcement proceedings are the same as under the Federal discrimination laws.

§ 41-1-20. Unlawful discrimination against union members.

> Every person who shall discharge or discriminate in the payment of wages against any person because of his membership in a labor organization shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than ten nor more than fifty dollars or be imprisoned not less than ten nor more than thirty days.
>
> S.C. Code Ann. §§ 1-13-30 & 1-13-80 does not expressly define harassment. However, the South Carolina Human Affairs Commission defines sexual harassment as:
>
> Harassment can include "sexual harassment" or unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature. Harassment does not have to be of a sexual nature, however, and can include offensive remarks about a person's sex. For example, it is illegal to harass a man or a woman by making offensive comments in general about either gender. Both victim and the harasser can be either a woman or a man, and the victim and harasser can be the same sex.
>
> Although the law doesn't prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted).

Additional Information can be found here: http://www.schac.sc.gov/ed/Pages/SexualHarassment.aspx

9. Is there a common law or statutory prohibition of retaliation?

See discussions in other sections.

10. Is the state a deferral state for charges filed with the EEOC?

Yes. S.C. Code Ann. § 1-13-90 provides that "[a]ny person shall complain in writing under oath or affirmation to the [S.C. Human Affairs] Commission within one hundred eighty days after the alleged discriminatory practice occurred. The Commissioner, his employees or agents, shall assist complainants in reducing verbal complaints to writing and shall assist in setting forth such information as may be required by the Commission."

11. Are there any state laws related to compensation, including wage and hour, paid time off, mandatory breaks, fringe benefits, allowable deductions, prevailing wage rates for public contracts, etc.?

In South Carolina, employees cannot be required to work on Sunday if they are conscientiously opposed to Sunday work. Sunday work must be compensated at no less than that required by the federal FLSA. S.C. Code Ann. §§ 53-1-100 et seq.

There is no statutory requirement that employers provide employees with vacation benefits.

South Carolina Payment of Wages Act

South Carolina's Payment of Wages Act, S.C. Code Ann. § 41-10-10, et. seq., applies to all employers employing five or more employees at all times during the preceding twelve months but specifically excludes from its application employers of domestic labor in private homes. S.C. Code Ann. § 41-10-20.

Notification and Payment Provisions:

The Act requires employers to notify employees, in writing and at the time of hiring, the normal hours and wages agreed upon, the time and place of payment, and the deductions which will be made from the wages, including payments to insurance programs. S.C. Code Ann. § 41-10-30. The employer has the option of giving written notification by posting the terms conspicuously at or near the place of work. Id. Any changes in these terms, with the exception of wage increases, must be made in writing at least seven calendar days before they become effective. Id. "When an employer separates an employee from the payroll for any reason, the employer shall pay all wages due to the employee within forty-eight hours of the time of separation or the next regular payday which may not exceed thirty days." S.C. Code Ann. § 41-10-50. If there is a dispute as to the amount of wages due, an employer is required to give written notice to the employee of the amount of wages the employer concedes to be due and make payment of that amount. S.C. Code Ann. § 41-10-60.

Penalties and Remedies:

Violations of the Act's notification and record keeping requirements will result in a written warning by the Commissioner of Labor for the first offense and a civil penalty of not more than $100 for each subsequent offense. S.C. Code Ann. §§ 41-10-30, 41-10-80. Employer violations regarding time, place, and medium of payment and unauthorized deductions will result in a civil penalty of not more than $100 for each violation. Id.

An employer's failure to pay wages indisputably due during the employment relationship or at discharge will give rise to a civil action in which an employee may recover an amount equal to three times the full amount of the unpaid wages, plus costs and reasonable attorney fees in the court's discretion. S.C. Code Ann. § 41-10-80(C); see also Adamson v. Marianne Fabrics, Inc., 301 S. C. 204, 391 S. E. 2d 249 (1990) (holding an award of both punitive and treble damages impermissible). Of note, an employee who breaches the common law duty of loyalty to an employer, often described as a "faithless servant," forfeits the right to compensation. See Schuermann v. American KA-RO Corp., 295 S.C. 64, 367 S.E.2d 159 (1988).

An employee has three years from the date upon which the wages became due to file a civil action for the recovery of wages. S.C. Code Ann. § 41-10-80.

12. Is there a state statute governing paid or unpaid leaves?

i. Medical

No state family/medical leave provisions.

However, pursuant to S.C. Code Ann. § 44-43-80, an employer may grant a paid leave of absence to an employee who seeks to undergo a medical procedure to donate bone marrow. Covered employees under this section are those that employ 20 or more employees at one or more sites within the state. Only employees who work an average of 20 or more hours a week are eligible, and the length of the combined paid leaves may not exceed 40 hours without the employer's agreement. Employer's may require verification by a physician of the need an purpose of each paid leave. If there is a medical determination that the employee does not qualify as a donor, the paid leave of absence granted before the determination is not forfeited. In addition, an employer may not retaliate against an employee for requesting or leaving a paid leave of absence under this provision

ii. Maternity / paternity

It is unfair discriminatory practice to deny a pregnant employee a maternity leave. Maternity leave benefits must apply to

both married and unmarried pregnant employees. These provisions apply to employers with 15 or more employees.

Moreover, women affected by pregnancy, childbirth, or related medical conditions must be treated the same for all employment purposes as other employees with temporary disabilities.

Accordingly, policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits, reinstatement and payment under any health or temporary disability insurance or sick leave plan must be applied to disability due to pregnancy, miscarriage, abortion, childbirth and recovery on the same terms and conditions as they are applied to other temporary disabilities.

S.C. Code Ann. §§ 1-13-30(e), (l), 1-13-80(a); S.C. Code Regs. 65-30.

iii. Military

Pursuant to S.C. Code Ann. § 25-1-2320, an employee who leaves work to serve in the South Carolina state or National Guard must be reinstated to his or her previous position of like seniority, status, and salary, as long as the employee:

1. Receives an honorable discharge;

2. Applies in writing to the employer within 5 days of discharge from duty or from hospitalization continued after release from active duty; and

3. Is still qualified for his or her position of employment.

However, is the former employee is no longer qualified for the previous position, the employer must offer an alternative position for which the employee is qualified and will give the employee appropriate seniority, status, and salary.

Pursuant to S.C. Code Ann. § 41-35-126, an individual is eligible for benefits if he or she left work voluntarily to relocate because of the transfer of a spouse who has been reassigned from one military assignment to another, provided that the separation from employment occurs within fifteen days of the scheduled relocation date. However, these benefits will not be charged to the employer's account. S.C. Code Ann. § 41-35-130(j).

iv. Voting

There are not S.C. provisions regarding leave for voting. However, it is unlawful to discharge an employee because an employee exercises political rights and privileges guaranteed by the federal or state laws and constitutions. S.C. Code Ann. § 16-17-560.

v. Jury duty

Under S.C. Code Ann. § 41-1-70, an employer may not demote an employee because the employee complied with a valid jury summons. However, the employer is not required to compensate an employee for time spent on jury service.

13. Is there a state law governing drug-testing?

S.C. Code Ann. § 41-1-15 permits employers to establish a drug prevention program in the workplace and requires that employers doing so notify all employees of the program and its policies at the time it is established or at the time an employee is hired, whichever is earlier. That statute also addresses the confidentiality of the information, including testing results, received by the employer through the program.

14. Is there a medical marijuana statute?

There is no statute addressing the medical or recreational use of marijuana in South Carolina. Note that under federal, it is illegal to possess or use marijuana.

15. Is there trade secret / confidential information protection for employers?

The following case law is taken from Carolina Chemical Equipment Co., Inc., v. Muckenfuss, 322 S.C. 289, 295–96, 471 S.E.2d 721, 724 (Ct. App. 1996):

The threshold issue in any trades secrets is not whether there was a confidential relationship or a breach of contract or some other kind of misappropriation, but whether there was a trade secret to be misappropriated. In determining whether something is a trade secret, one must consider the extent to which the information is known outside of his business and the ease or difficulty with which the information could be properly acquired or duplicated by others.

South Carolina courts approved the broad definition of trade secrets found in Restatement (First) of Torts § 757 cmt. B (1939): "A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business and

which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral *296 events in the conduct of the business.... The subject matter of a trade secret [must have] ... a substantial element of secrecy ... so that, except by the use of improper means, there would be difficulty in acquiring the information."

See also Lowndes Prod., Inc. v. Brower, 259 S.C. 322, 191 S.E.2d 761 (1972).

16. Is there any law related to employee's privacy rights?

i. Social Media

None.

ii. Polygraph Tests

None.

iii. **Confidential / Identity Information**

S.C. Code Ann. § 39-1-90 applies to any person or business that conducts business in South Carolina that owns or licenses computerized data that includes personal information. This section defines personal information as an Individual's first name or first initial and last name in combination with any one or more of the following:

1. Social Security number;

2. Driver's license number;

3. Account number or credit or debit card number in combination with any required security code, access code or password that would permit access to the account; or

4. Other numbers or information which may be used to access a person's financial account or numbers or information issued by a governmental or regulatory entity that uniquely will identify an individual.

An exemption to this code section is information that is lawfully obtained from publicly available information, or from federal, state, or local government records lawfully made available to the general public.

Exception to the covered entities under the statute include: (1) Any persons that is subject to and complies with title V of the Gramm-Leach-Bliley Act; and (2) A financial institution that is subject to and in compliance with the Federal Interagency Guidance on Response Programs for Unauthorized Access to Consumer Information and Customer Notice.

iv. Access to Employee Communications, Including Telephone and E-Mail

S.C. Code Ann. § 41-1-65 grants employers immunity from civil liability for disclosing an employee's or former employee's dates of employment, pay level, and wage history to a prospective employer. It also grants immunity to an employer who responds in writing to a written request concerning a current employee or former employee from a prospective employer of that employee for disclosure of the following information to which an employee or former employee may have access:

(1) written employee evaluations;

(2) official personnel notices that formally record the reasons for separation;

(3) whether the employee was voluntarily or involuntarily released from service and the reason for the separation; and

(4) information about job performance

The immunity granted by S.C. Code Ann. § 41-1-65 statute does not apply when an employer knowingly or recklessly releases or discloses false information.

S.C. Code Ann. § 41-1-15 requires that any information, including drug testing results, received by an employer who has established a drug prevention program be kept confidential absent the employee consents to its release.

17. Is there any law restricting arbitration in the employment context?

In Flexon v. PHC-Jasper, Inc, the South Carolina Court of Appeals stated "the United States Supreme Court has expressly noted that "[e]mployment contracts, except for those covering workers engaged in transportation, are covered by the FAA." 399 S.C. 83, 90, 731 S.E.2d 1, 4 (Ct. App. 2012) (citing E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 289, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002)).

18. Is there any law governing weapons in the employment context?

S.C. Code Ann. § 23-31-220 permits an employer to prohibit concealed weapons on company property, in the workplace, or while using any machinery, vehicle, or equipment owned or operated by the business.

Furthermore, pursuant to S.C. Code Ann. **§§ 23-31-220, 23-31-235,** the posting of a sign stating "No Concealable Weapons Allowed" constitutes notice to a permit holder that the employer, owner, or person in legal possession requests that concealable weapons not be brought on the premises or into the workplace. To prohibit carrying concealable weapons on property, there must be a sign expressing the prohibition in both written language interdict and universal sign language. The signs must be:

1. Posted at each entrance into a building where a concealable weapon permit holder is prohibited from carrying a concealable weapon;

2. Clearly visible from outside the building;

3. Eight inches wide by twelve inches tall;

4. Contain the words "NO CONCEALABLE WEAPONS ALLOWED" in black three-inch tall uppercase type at the bottom of the sign and centered between the lateral edges of the sign;

5. Contain a black silhouette of a handgun inside a circle thirty-four inches in diameter with a diagonal line that is two inches wide and runs from the lower left to the upper right at a forty-five degree angle from the horizontal;

6. A diameter of a circle; and

7. Placed not less than forty inches and not more than sixty inches from the bottom of the building's door. If the premises do not have doors, the signs must be:

    36 inches wide by 48 inches tall;

    Contain the words "NO CONCEALABLE WEAPONS ALLOWED" in black three-inch tall uppercase type at the bottom of the sign and centered between the lateral edges of the sign;

    Contain a black silhouette of a handgun inside a circle thirty four inches in diameter with a diagonal line that is two inches wide and runs from the lower left to the upper right at a 45 degree angle from the horizontal, and must be a diameter of a circle whose circumference is two inches wide;

    Placed no less than 40 inches and no more than 96 inches above the ground; and

    Posted in sufficient quantities to be clearly visible from any point of entry onto the premises.

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1. Is the state generally an employment-at-will state?

Yes.

The doctrine of employment-at-will is a long standing rule in Tennessee, which recognizes the right of either the employer or the employee to terminate the employment relationship at any time, for good cause, bad cause, or no cause at all, without being guilty of a legal wrong. *Harney v. Meadowbrook Nursing Center*, 784 S.W.2d 921, 922 (Tenn. 1990); *Watson v. Cleveland Chair Co.*, 789 S.W.2d 538 (Tenn. 1989).

2. Are there any statutory exceptions to the employment-at-will doctrine?

Yes.

Tenn. Code Ann. § 50-1-304 (f) provides:

In any civil cause of action for retaliatory discharge brought pursuant to this section, or in any civil cause of action alleging retaliation for refusing to participate in or remain silent about illegal activities, the plaintiff shall have the burden of establishing a prima facie case of retaliatory discharge. If the plaintiff satisfies this burden, the burden shall then be on the defendant to produce evidence that one (1) or more legitimate, nondiscriminatory reasons existed for the plaintiff's discharge. The burden on the defendant is one of production and not persuasion. If the defendant produces such evidence, the presumption of discrimination raised by the plaintiff's prima facie case is rebutted, and the burden shifts to the plaintiff to demonstrate that the reason given by the defendant was not the true reason for the plaintiff's discharge and that the stated reason was a pretext for unlawful retaliation. The foregoing allocations of burdens of proof shall apply at all stages of the proceedings, including motions for summary judgment. The plaintiff at all times retains the burden of persuading the trier of fact that the plaintiff has been the victim of unlawful retaliation.

Elements: Four elements necessary for the existence of a cause of action under the Tennessee Public Protection Act, compiled in T.C.A. § 50-1-304, are: (1) the plaintiff's status as an employee of the defendant; (2) the plaintiff's refusal to participate in, or to remain silent about, illegal activities; (3) the employer's discharge of the employee; and (4) an exclusive causal relationship between the plaintiff's refusal to participate in or remain silent about illegal activities and the employer's termination of the employee. *Griggs v. Coca-Cola Employees' Credit Union*, 909 F. Supp. 1059, 1995 U.S. Dist. LEXIS 19752 (E.D. Tenn. 1995).

3. Are there any public policy exceptions to the employment-at-will doctrine?

Both by statute and case law in Tennessee, some restrictions have been imposed upon the right of an employer to terminate an at-will employee. In Tennessee, an employee-at-will generally may not be discharged for attempting to exercise a statutory or constitutional right, or for any other reason which violates a clear public policy that is evidenced by an unambiguous constitutional, statutory, or regulatory provision. See e.g., *Mason v. Seaton*, 942 S.W.2d 470 (Tenn.1997) (reporting the belief that the employer is violating a regulation or statutory provision); *Conatser v. Clarksville Coca-Cola*, 920 S.W.2d 646 (Tenn.1995) (asserting a workers' compensation claim); *Reynolds v. Ozark Motor Lines, Inc.*, 887 S.W.2d 822 (Tenn.1994) (terminated for refusing to make trips without the pre-trip inspections required by state law); *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn.1992) (terminated for reporting to jury duty).

Damages: Tenn. Code Ann. § 50-1-304 (c) (1) provides that "(a)ny employee terminated in violation of subsection (b) shall have a cause of action against the employer for retaliatory discharge and any other damages to which the employee may be

entitled, subject to the limitations set out in § 4-21-313 which provides damages for backpay, interest on backpay, front pay, equitable relief. reinstatement, damages for humiliation and embarrassment, reasonable attorney's fees, and costs of litigation. § 4-21-311(b); *Sneed v. City of Red Bank*, 459 S.W.3d 17, 27 (Tenn. 2014).

Jury Trial: An employee is not entitled to a jury trial on a retaliation claim when such claims are brought under the Governmental Tort Liability Act . *Young v. City of LaFollette* , 2015 Tenn. LEXIS 695, *1 (Tenn. Aug. 26, 2015). However, when such action is a private action, there is a statutory right to jury trial for claims under the Tennessee Public Protection Act, Tenn. Code Ann. § 50-1-304 (2008 & Supp. 2009), in chancery court but not in circuit court. *Young v. City of LaFollette* , 2015 Tenn. LEXIS 695, *1 (Tenn. Aug. 26, 2015)

4. Is there any law related to the hiring process?

a. **Immigration**

Under Tenn. Code Ann. § 50-1-103 (b) A person shall not knowingly employ, recruit or refer for a fee for employment an illegal alien. A person has not violated subsection (b) with respect to a particular employee if the person requested from the employee, received, and documented in the employee record, after commencement of employment, lawful resident verification information consistent with employer requirements under the Immigration Reform and Control Act of 1986, compiled in 8 U.S.C. § 1101 et seq. Tenn. Code Ann. § 50-1-103 (c). (d) A person has not violated subsection (b) with respect to a particular employee if the person verified the work authorization status of the employee by using the federal electronic work authorization verification service provided by the United States department of homeland security pursuant to the federal Basic Pilot Program Extension and Expansion Act of 2003, P.L. 108-156, or any successor program thereto, and the verification service returned a confirmation showing that: (1) Such employee was eligible to work; (2) Such employee was ineligible to work, but the employee has appealed such confirmation and the appeal has not been resolved; or (3) Such employee was ineligible to work, the employee has not appealed such confirmation and the time for such employee to appeal pursuant to federal law has not expired. Tenn. Code Ann. § 50-1-103 (d). The statute does not indicate whether there is a private right of action for damages.

b. **Recruitment/Advertisement**

Tenn. Code Ann. § 50-1-102 (a) (1) provides: It is unlawful for any person to induce, influence, persuade or engage workers to change from one place to another in this state, or to bring workers of any class or calling into this state to work in any type of labor in this state through or by means of false or deceptive representations, false advertising or false pretenses, concerning the kind and character of the work to be done, or the amount and character of compensation to be paid for the work, or the sanitary or other conditions of the employment, or as to the existence or nonexistence of a strike or other trouble pending between employer and employees, at the time of or prior to the engagement.

Tenn. Code Ann. § 50-1-102 (a) (2) provides: Failure to state in any advertisement, proposal or contract for the employment of workers that there is a strike, lockout or other labor trouble at the place of the proposed employment, when in fact the strike, lockout or other labor trouble then actually exists at the place of the proposed employment, is deemed false advertising and misrepresentation for the purposes of this section.

Tenn. Code Ann. § 50-1-102 (c) (1) provides: Any worker who is influenced, induced or persuaded to engage with any persons mentioned in subsection (a), through or by means of any of the things prohibited in subsection (a), has a right of action for all damages that the worker has sustained in consequence of the false or deceptive representations, false advertising, and false pretenses used to induce the worker to change the worker's place of employment, against any person who, directly or indirectly, causes the damage.

Tenn. Code Ann. § 50-1-102 (c) (2) provides: In addition to all actual damages the worker may have sustained, the worker is entitled to recover such reasonable attorney's fees as the court shall fix, to be taxed as costs.

c. **Medical history**

Tenn. Code Ann. § 50-1-306 (b) provides: It is unlawful for any employer, or an agent, contractor or employee of an employer, to market or sell medical information that directly identifies an employee, unless the patient has authorized the release in written, electronic or other form that indicates the patient's consent, including records for medical services provided or paid for by the employer for purposes unrelated to: (1) The provision of health care to the employee or family members receiving health insurance; (2) Payment for health care to the employee or family members receiving health insurance; or (3) Administration of any health plan or program offered by the plan. This section shall not apply to information for which the employee or family member has executed a voluntary waiver or release. Tenn. Code Ann. § 50-1-306 (d). The statute does not indicate whether there is a private right of action for damages.

d. Employment history

Tenn. Code Ann. § 50-1-105 provides: Any employer that, upon request by a prospective employer or a current or former employee, provides truthful, fair and unbiased information about a current or former employee's job performance is presumed to be acting in good faith and is granted a qualified immunity for the disclosure and the consequences of the disclosure. The presumption of good faith is rebuttable upon a showing by a preponderance of the evidence that the information disclosed was: (1) Knowingly false; (2) Deliberately misleading; (3) Disclosed for a malicious purpose; (4) Disclosed in reckless disregard for its falsity or defamatory nature; or (5) Violative of the current or former employee's civil rights pursuant to current employment discrimination laws. Under this statute, mere negligence is not enough to rebut the presumption in favor of the employer's good faith. *Id*. In contrast, defamation may be proven by establishing that a party published a false and defaming statement with reckless disregard for the truth or with negligence in failing to ascertain the truth. *Sullivan v. Baptist Mem. Hosp.*, 995 S.W.2d 569, 575 (Tenn. 1999). The statute does not indicate what damages are available.

5. Does the state recognize implied employment contracts under employment handbooks, policies, or practices?

In order to be considered as an employment contract, an employee handbook must contain "guarantees or binding commitments." However, even in the absence of a definite durational term, an employment contract still may exist with regard to other terms of employment. *Williams v. Maremont Corp.*, 776 S.W.2d 78, 80 (Tenn. Ct. App. 1988); accord *Hooks v. Gibson*, 842 S.W.2d 625, 628 (Tenn. Ct. App. 1992). In this regard, Tennessee has recognized that an employee handbook can become a part of an employment contract. *Smith v. Morris*, 778 S.W.2d 857, 858 (Tenn. App. 1988) (citing *Hamby v. Genesco*, Inc., 627 S.W.2d 373 (Tenn. App. 1981)); accord *Davis v. Connecticut Gen. Life Ins. Co*., 743 F.Supp. 1273, 1278 (M.D.Tenn. 1990). In order to constitute a contract, however, the handbook must contain specific language showing the employer's intent to be bound by the handbook's provisions. *Smith v. Morris*, 778 S.W.2d at 858. Unless an employee handbook contains such guarantees or binding commitments, the handbook will not constitute an employment contract. *Whittaker v. Care-More, Inc.*, 621 S.W.2d at 397. As stated by one court, in order for an employee handbook to be considered part of an employment contract, "the language used must be phrased in binding terms, interpreted in the context of the entire handbook, and read in conjunction with any other relevant material, such as an employment application." *Claiborne v. Frito-Lay, Inc.*, 718 F.Supp. 1319, 1321 (E.D.Tenn.1989); *Sudberry v. Royal & Sun Alliance*, 344 S.W.3d 904, 912-913 (Tenn. Ct. App. 2008).

6. Does the state have a right to work law or other labor / management laws?

Yes.

Tenn. Code Ann. § 50-1-206 (a) provides: It is the public policy of this state that employees of this state have the right to: (1) Employment without regard to any person's refusal to join or affiliate with, or decision to withdraw from or cease membership in, any labor union or employee organization of any kind; (2) Be employed free from the restraints of any contract, combination or agreement, written or oral, that provides for exclusion from employment of any person due to their refusal to join or affiliate with, or decision to withdraw from or cease membership in, any labor union or employee organization of any kind; (3) Be employed without regard to any person's refusal to pay dues, fees, assessments or other charges to any labor union or employee organization of any kind; and (4) Decertify a union or other bargaining representative upon compliance with the applicable federal law.

7. What tort claims are recognized in the employment context?

a. **Intentional Infliction of Emotional Distress** – Yes. Tennessee courts have created an exception to the exclusivity provision for intentional torts committed by an employer against an employee; these torts give rise to a common-law tort action for damages. *Bellomy v. Autozone, Inc.*, 2009 Tenn. App. LEXIS 792, *27, 107 Fair Empl. Prac. Cas. (BNA) 1474, 2009 WL 4059158 (Tenn. Ct. App. Nov. 24, 2009). Damages are provided under the common law including compensatory and punitive damages. No statutory provision addresses a claim for attorney's fees for this tort. Either party may move for a jury trial.

b. **Negligent Infliction of Emotional Distress** – Yes. *See Coleman v. Humane Soc'y of Memphis*, 2014 Tenn. App. LEXIS 77, 37 I.E.R. Cas. (BNA) 1516, 2014 WL 587010 (Tenn. Ct. App. Feb. 14, 2014). Damages are provided under the common law including compensatory damages. No statutory provision addresses a claim for attorney's fees for this tort. Either party may move for a jury trial.

c. **Harassment/Assault/Battery** – An employee may file a cause of action against a fellow employee for assault and battery but not against the employer unless the employer directed the action. *Williams v. Smith*, 222 Tenn. 284, 435 S.W.2d 808, 1968 Tenn. LEXIS 432 (Tenn. 1968). There is a civil cause of action for malicious harassment. A person may be liable to the victim of malicious harassment for both special and general damages, including, but not limited to, damages for emotional distress,

reasonable attorney's fees and costs, and punitive damages. Tenn. Code Ann. § 4-21-701 (a) and (b). Either party may move for a jury trial.

8. Is there a common law statutory prohibition against discrimination / hostile work environment?

a. **Race and Color**- Yes. It is a discriminatory practice for an employer to: Fail or refuse to hire or discharge any person or otherwise to discriminate against an individual with respect to compensation, terms, conditions or privileges of employment because of such individual's race, creed, color, religion, sex, age or national origin. Tenn. Code Ann. § 4-21-401 (a). Damages and remedies for such violation include: Hiring, reinstatement or upgrading of employees with or without back pay. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable; Payment to the complainant of damages for an injury, including humiliation and embarrassment, caused by the discriminatory practice, and cost, including a reasonable attorney's fee. Tenn. Code Ann. § 4-21-306 (a) (1) and (7).

b. **Ethnic/National Origin** – Yes. See Tenn. Code Ann. § 4-21-401 (a). Damages and remedies for such violation include: Hiring, reinstatement or upgrading of employees with or without back pay. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable; Payment to the complainant of damages for an injury, including humiliation and embarrassment, caused by the discriminatory practice, and cost, including a reasonable attorney's fee. Tenn. Code Ann. § 4-21-306 (a) (1) and (7).

c. **Gender -** Yes. See Tenn. Code Ann. § 4-21-401 (a). Damages and remedies for such violation include: Hiring, reinstatement or upgrading of employees with or without back pay. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable; Payment to the complainant of damages for an injury, including humiliation and embarrassment, caused by the discriminatory practice, and cost, including a reasonable attorney's fee. Tenn. Code Ann. § 4-21-306 (a) (1) and (7).

d. **Age –** Yes. Employers cannot discriminate based upon age for individuals who are at least forty (40) years of age. Tenn. Code Ann. § 4-21-407 (b). Damages and remedies for such violation include: Hiring, reinstatement or upgrading of employees with or without back pay. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable; Payment to the complainant of damages for an injury, including humiliation and embarrassment, caused by the discriminatory practice, and cost, including a reasonable attorney's fee. Tenn. Code Ann. § 4-21-306 (a) (1) and (7).

e. **Religion -** Yes. See Tenn. Code Ann. § 4-21-401 (a). Damages and remedies for such violation include: Hiring, reinstatement or upgrading of employees with or without back pay. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable; Payment to the complainant of damages for an injury, including humiliation and embarrassment, caused by the discriminatory practice, and cost, including a reasonable attorney's fee. Tenn. Code Ann. § 4-21-306 (a) (1) and (7).

f. **Veteran / military status** - It is a Class E felony for any person, firm or corporation to refuse employment to any person for the sole reason that the person is a member of the Tennessee national guard or to terminate the employment of any such person for such reason or because of absence from place of employment while attending any prescribed drill, including annual field training. Tenn. Code Ann. § 58-1-604. The remedies under this statute due not address damages available or jury trials.

g. **Disability** - Tenn. Code Ann. § 8-50-103 provides that there shall be no discrimination in the hiring, firing and other terms and conditions of employment of the state of Tennessee or any department, agency, institution or political subdivision of the state, or of any private employer, against any applicant for employment based solely upon any physical, mental or visual disability of the applicant, unless such disability to some degree prevents the applicant from performing the duties required by the employment sought or impairs the performance of the work involved. Furthermore, no blind person shall be discriminated against in any such employment practices because such person uses a guide dog. A violation of this subsection (b) is a Class C misdemeanor. The handicap discrimination statute embodies the remedies provided by the THRA in Tenn. Code Ann. §§ 4-21-302 to -311. Tenn. Code Ann. § 8-50-103(b)(2). The THRA provides a broad array of remedies including: hiring, reinstatement with or without back pay, injunctive relief, payment of damages for injury, costs, reasonable attorney's fee, and "such other remedies as necessary to eliminate all the discrimination identified by the evidence. . ." Tenn. Code Ann. §§ 4-21-306 & -311. See *Forbes v. Wilson County Emergency Dist. 911 Bd.*, 966 S.W.2d 417, 421, 1998 Tenn. LEXIS 209, *10 (Tenn. 1998)

h. **Genetic Information** - No.

i. **Sexual Orientation** – No.

j. **Sexual identity** – No.

9. Is there a common law or statutory prohibition of retaliation?

a. **Discrimination Claims** – Yes. Employers cannot retaliate or discriminate in any manner against a person because such person has opposed a practice declared discriminatory or because such person has made a charge, filed a complaint, testified, assisted or participated in any manner in any investigation, proceeding or hearing under this chapter. Tenn. Code Ann. § 4-21-301 (1). Tennessee Human Rights Act (THRA), T.C.A. § 4-21-101 et seq., made no distinction between the remedies available for discrimination claims and retaliation claims as both were expressly placed into the category of discriminatory practices; thus, compensatory damages would be available for the employee's retaliation claim under state law. *Baker v. Windsor Republic Doors*, 635 F. Supp. 2d 765, 2009 U.S. Dist. LEXIS 61031 (W.D. Tenn. July 10, 2009).

b. **Workers' Compensation Claims** – Yes. See Tenn. Code Ann. § 50-1-304 (f) discussed above. Tenn. Code Ann. § 50-1-304 (c) (1) provides that "(a)ny employee terminated in violation of subsection (b) shall have a cause of action against the employer for retaliatory discharge and any other damages to which the employee may be entitled, subject to the limitations set out in § 4-21-313 which provides damages for backpay, interest on backpay, front pay, equitable relief. reinstatement, damages for humiliation and embarrassment, reasonable attorney's fees, and costs of litigation. § 4-21-311(b); *Sneed v. City of Red Bank*, 459 S.W.3d 17, 27 (Tenn. 2014)

c. **Military Service** - It is a Class E felony for any person, firm or corporation to refuse employment to any person for the sole reason that the person is a member of the Tennessee national guard or to terminate the employment of any such person for such reason or because of absence from place of employment while attending any prescribed drill, including annual field training. Tenn. Code Ann. § 58-1-604. The remedies under this statute due not address damages available or jury trials.

d. **Maternity/Paternity Leaves-** Yes, however, if an employee's job position is so unique that the employer cannot, after reasonable efforts, fill that position temporarily, then the employer shall not be liable under this section for failure to reinstate the employee at the end of the leave period. Tenn. Code Ann. § 4-21-408; *Payne v. Goodman Mfg. Co.*, L.P., 726 F. Supp. 2d 891, 2010 U.S. Dist. LEXIS 67191 (E.D. Tenn. 2010). The Tennessee Maternity by its plain language does not apply to an employer who employs fewer than 100 full-time employees on a permanent basis at the job site or location. Tenn. Code Ann. § 4-21-408 (d); *Treadaway v. Big Red Powersports*, LLC, 611 F. Supp. 2d 768, 772, 2009 U.S. Dist. LEXIS 19884, *1 (E.D. Tenn. 2009)

e. **Whistle Blowing-** Statutory claim may be brought under Tenn. Code Ann. § 50-1-304.

f. **Safety Complaints-** Statutory claim may be brought under Tenn. Code Ann. § 50-1-304.

g. **Voting-** Any person entitled to vote in an election held in this state may be absent from any service or employment on the day of the election for a reasonable period of time, not to exceed three (3) hours, necessary to vote during the time the polls are open in the county where the person is a resident. Tenn. Code Ann. § 2-1-106 (a). A voter who is absent from work to vote in compliance with this section may not be subjected to any penalty or reduction in pay for such absence. Tenn. Code Ann. § 2-1-106 (b).

h. **Jury Duty/Court Attendance-** No employer shall discharge or in any manner discriminate against an employee for serving on jury duty. Tenn. Code Ann. § 22-4-106 (d) (1).

10. Is the state a deferral state for charges filed with the EEOC?

Yes. T.C.A. § 4-21-101 provides that Tennessee is a "deferral state" that prohibits discrimination in employment based on age or race, and authorizes a state authority to grant relief. *Casillas v. Fed. Express Corp.*, 140 F. Supp. 2d 875, 2001 U.S. Dist. LEXIS 6161, 177 A.L.R. Fed. 763 (W.D. Tenn. 2001).

11. Are there any state laws related to compensation, including wage and hour, paid time off, mandatory breaks, fringe benefits, allowable deductions, prevailing wage rates for public contracts, etc.?

Compensation – All wages or compensation of employees in private employments shall be due and payable as follows: (1) All wages or compensation earned and unpaid prior to the first day of any month shall be due and payable not later than the twentieth day of the month following the one in which the wages were earned; (2) All wages or compensation earned and unpaid prior to the sixteenth day of any month shall be due and payable not later than the fifth day of the succeeding month; and (3) For the purposes of this subsection (a), the final wages of an employee who quits or is discharged shall include any vacation pay or other compensatory time that is owed to the employee by virtue of company policy or labor agreement. This subdivision (a)(3) does not mandate employers to provide vacations, either paid or unpaid, nor does it require that employers establish written vacation pay policies. Tenn. Code Ann. § 50-2-103. The statute does not address a private right of action for

damages.

Wage and Hour – No.

Paid Time off- Tennessee law does not mandate employers to provide vacations, either paid or unpaid, nor does it require that employers establish written vacation pay policies. Tenn. Code Ann. § 50-2-103. The statute does not address a private

right of action for damages.

Mandatory breaks –Except as provided in subdivision (h)(2), each employee shall have a thirty-minute unpaid meal break if scheduled to work six (6) hours consecutively, except in workplace environments that by their nature of business provide ample opportunity to take an appropriate meal break. The meal break shall not be scheduled during or before the first hour of scheduled work activity. Tenn. Code Ann. § 50-2-103(h) (1) (A). However, at the discretion of an employer, an employee who is principally employed in the service of food or beverages to customers and who, in the course of such employment, receives tips and reports the tips to the employer may waive the employee's right to a thirty-minute unpaid meal break. Tenn. Code Ann. § 50-2-103. The statute does not address a private right of action for damages.

Allowable deductions -Tenn. Code Ann. § 50-2-105 provides for garnishment of wages. 50-2-110 provides for offset of moneys owed by employee to employer. The statute does not address a private right of action for damages.

12. Is there a state statute governing paid or unpaid leaves?

i. Medical – No.

ii. Maternity / paternity - Leave may be with or without pay at the discretion of the employer. Tenn. Code Ann. § 4-21-408 (1). The statute does not address a private right of action for damages.

iii. Military – There is no state law requiring paid leave for military service.

iv. Voting - A voter who is absent from work to vote in compliance with this section may not be subjected to any penalty or reduction in pay for such absence. Tenn. Code Ann. § 2-1-106 (b). The statute does not address a private right of action for damages.

v. Jury duty - The employee shall be entitled to the employee's usual compensation received from such employment; however, the employer has the discretion to deduct the amount of the fee or compensation the employee receives for serving as a juror. Tenn. Code Ann. § 22-4-106 (b). The statute does not address a private right of action for damages.

13. Is there a state law governing drug-testing?

An employer may elect to sign up for the Drug Free Workplace Program under Tenn. Code Ann. § 50-9-104. Otherwise, employers are still free to drug test.

14. Is there a medical marijuana statute?

No, the legislature was supposed to address this issue in 2017, but the bill quickly did not survive, and it was determined to push the vote on the issue to a later date.

15. Is there trade secret / confidential information protection for employers?

Yes. The Tennessee Uniform Trade Secret Act ("TUTSA"), Tenn. Code Ann. § 47–25–1701, et. seq., provides a framework to obtain relief for the misappropriation of trade secrets.

16. Is there any law related to employee's privacy rights?

i. **Social Media** – Yes. Tennessee law prevents an employer from taking any adverse employment action against an employee for failure to provide access to a "personal internet account" (which basically includes any type of internet account). "Personal internet account" is defined as follows: (5) "Personal Internet account": (A) Means an online account that is used by an employee or applicant exclusively for personal communications unrelated to any business purpose of the employer; and includes any electronic medium or service where users may create, share or view content, including, emails, messages, instant messages, text messages, blogs, podcasts, photographs, and videos or user-created profiles. Tenn. Code Ann. § 50-1-1003.

ii. **Polygraph Tests** – Yes. No employer may take any personnel action based solely upon the results of a polygraph examination. Tenn. Code Ann. § 62-27-128.

17. Is there any law restricting arbitration in the employment context?

No.

18. Is there any law governing weapons in the employment context?

Yes. Tennessee allows employees to bring firearms to work if they are kept in the employee's vehicle. See Tenn. Code Ann. § 39-17-1313.

TEXAS

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1. Is the state generally an employment-at-will state?

Texas is an employment at will state, which means either the employer or the employee may terminate the employment relationship at any time, with or without cause, and with or without advance notice.

2. Are there any statutory exceptions to the employment-at-will doctrine?

Texas has established several statutory exceptions to the at-will doctrine, often following along the lines of federal legislation:

Employees may not be discharged because of their membership in a protected class - i.e., race, color, disability, religion, sex, national origin, or age. Tex. Labor Code §21.051.

An employer may not retaliate or otherwise discriminate against an employee for opposing a discriminatory employment practice; making a discrimination charge; filing a discrimination complaint, or testifying, assisting, or participating in an investigation, proceeding, or hearing of discrimination. Tex. Lab. Code Ann. § 21.055.

Employees may not be discharged because of genetics. Tex. Labor Code §21.402.

Employees may not be terminated for making a good faith worker's compensation claim. Tex. Labor Code §451.001.

Employees may not be terminated for participating in a general public evacuation ordered under an emergency evacuation order. Tex. Labor Code §22. 002.

An employer is prohibited from blacklisting former employees with the intent to prevent them from obtaining other employment. Tex. Labor Code §52.031.

An employer may not discharge, discipline, or penalize in any manner an employee because the employee complies with a valid subpoena to appear in a civil, criminal, legislative, or administrative proceeding. Tex. Labor Code §52.051.

Employees may not be discharged for being in a qualified union, or for non-membership in a union, acting under a collective bargaining agreement, or engaging in pre-union concerted action – i.e., complaining about the terms and conditions of employment. Tex. Labor Code §101.052.

An employer is prohibited from discharging or suspending an employee in retaliation for reporting an alleged violation of an occupational health or safety law via the Safety Violations Hotline (through the Texas Department of Insurance, Workers' Compensation Division). However, the report must be made in good faith. Tex. Lab. Code Ann. § 411.082.

An employer may not discharge or otherwise discriminate against an employee in retaliation for filing a complaint, assisting an inspector, instituting a proceeding, testifying, or exercising a right under the Hazard Communication Act which requires employers to provide employees with information regarding hazardous chemicals in the workplace. See Tex. Health & Safety Code Ann. § 502.017(c).

A hospital or health care facility may not discriminate against a physician, nurse, staff member, or employee, or an applicant for one of those positions, who refuses to perform or participate in an abortion procedure, or their willingness to perform or participate in an abortion procedure at another facility. Tex. Occ. Code §103.002.

A hospital, mental health facility, or treatment facility may not discharge or otherwise discriminate against an employee for reporting violations of law. The report may be made internally to a supervisor or to a state regulatory of law enforcement agency. Tex. Health & Safety Code Ann. § 161.134(a).

A nursing home or related institution may not discharge or otherwise discriminate against an employee for reporting violations of laws pertaining to nursing homes and related institutions, including reports of abuse and neglect. Employees who initiate or cooperate in an investigation or proceeding are also protected. Tex. Health & Safety Code Ann. § 242.133.

An intermediate care facility for the mentally retarded may not discharge or otherwise discriminate against an employee for reporting violations of law, including violations of laws pertaining to such facilities. The report may be made to a supervisor, a state regulatory agency, or law enforcement agency. Employees who initiate or cooperate in an investigation or proceeding pertaining to the facility's care, services, or conditions are protected. Tex. Health & Safety Code Ann. §252.132.

A private employer may not terminate the employment of a permanent employee because the employee serves as a juror. Tex. Civ. P. & Rem. Code §122.001 and §122.0022.

A state or local governmental entity may not suspend or terminate the employment of, or take other adverse personnel action against, a public employee who in good faith reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority. Tex. Gov't Code §554.001 et seq.

An employer may not use an order or writ of withholding as grounds in whole or part for the termination of employment or for any other disciplinary action against an employee.

Tex. Family Code §158.209.

An employer may not refuse to permit an employee to be absent from work to attend a political convention if the employee is eligible to participate or attend a county, district, or state convention to which the employee is a delegate. Texas Elections Code §161.007.

An employee may not be terminated or discriminated against for reporting fraud or falsification of a Medicaid claim. Tex. Hum. Res. Code § 36.115.

An employee may not be discriminated against for reporting suspected child abuse. Tex. Fam. Code § 261.110.

The Texas Government Code previously prohibited the discharge of an employee who is a member of the military forces of any state and who is ordered to training or active duty. Texas Government Code §§431.005-431.006. However, these sections were repealed in 2013.

3. Are there any public policy exceptions to the employment-at-will doctrine?

Texas has created a public policy exception to the at will doctrine for employees who refuse to commit an illegal act. These employees cannot be discharged solely for such refusal. *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985). A plaintiff may request a jury trial, and if successful, can recover the any or all of the following damages in such case:

a. Reinstatement (if viable)/injunctive relief
b. Back pay and benefits
c. Future pay and benefits
d. Actual (Compensatory) Damages
e. Punitive (Exemplary) Damages
f. Court costs

4. Is there any law related to the hiring process?

a. Applications - Under Section 52.031(d) of the Texas Labor Code, a truthful written job reference cannot be the basis for a defamation lawsuit. See also Tex. Labor Code §§103.001 – 103.004.

b. Background - In-home service and residential delivery companies must perform a complete criminal history background check through DPS or a private vendor on any employees or associates sent by the companies into customers' homes (including attached garages or construction areas next to homes), or else confirm that the persons sent into customers' homes are licensed by an occupational licensing agency that conducted such a criminal history check before issuing the license. The records must show that during the past 20 years for a felony, and the past 10 years for a class A or B misdemeanor, the person has not been convicted of, or sentenced to deferred adjudication for, an offense against a person or a family, an offense against property, or public indecency. A check done in compliance with these requirements entitles the person's employer to a rebuttable presumption that the employer did not act negligently in hiring the person. See the Texas Civil Practice and Remedies Code, §§145.002-145.004.

c. Credit history - Texas employers may obtain consumer reports for employment purposes. However, unless the prospective

b. Background - In-home service and residential delivery companies must perform a complete criminal history background check through DPS or a private vendor on any employees or associates sent by the companies into customers' homes (including attached garages or construction areas next to homes), or else confirm that the persons sent into customers' homes are licensed by an occupational licensing agency that conducted such a criminal history check before issuing the license. The records must show that during the past 20 years for a felony, and the past 10 years for a class A or B misdemeanor, the person has not been convicted of, or sentenced to deferred adjudication for, an offense against a person or a family, an offense against property, or public indecency. A check done in compliance with these requirements entitles the person's employer to a rebuttable presumption that the employer did not act negligently in hiring the person. See the Texas Civil Practice and Remedies Code, §§145.002-145.004.

e. Credit history - Texas employers may obtain consumer reports for employment purposes. However, unless the prospective employee will be making more than $75,000 per year, information contained in the consumer report generally may not date back more than 7 years from the date of the report. Tex. Bus. Code §20.05.

f. Employment history - Employers are protected statutorily from defamation claims unless an employee can prove with clear and convincing evidence that the information disclosed was known by that employer to be false at the time the disclosure was made or that the disclosure was made with malice or in reckless disregard for the truth or falsity of the information disclosed. Tex. Labor Code §§103.001 – 103.004.

5. Does the state recognize implied employment contracts under employment handbooks, policies, or practices?

Employee handbooks and policy manuals are generally viewed as non-binding guidelines unless they contain clear language indicating an intent to enter into a binding contract. However, language appearing in a handbook that specifically and expressly restricts the employer's right to terminate an employee may be interpreted by courts as altering the at-will status. Most handbooks and manuals contain an explicit statement reserving the right to alter, amend, or change any policy at any time and for any reason which is sufficient to maintain the at-will status of the employees.

It is also possible for an oral contract to remove the employee from at-will status, but it is difficult to prove such a contract. As one Texas court explained:

For such an agreement to exist, the employer must unequivocally indicate a definite intent to be bound not to terminate the employee except under clearly specified circumstances. In other words, to be enforceable, an agreement to modify the employment at-will relationship must be (1) express rather than implied, and (2) clear and specific.

Miksch v. Exxon Corp., 979 S.W.2d 700, 703 (Tex. App. -- Houston [14th Dist.] 1998, pet. denied).

Also, if the term of employment is specified as lasting for one or more years, the Texas statute of frauds will require the contract be in writing. Tex. Bus. & Comm. Code § 26.01.

6. Does the state have a right to work law or other labor / management laws?

Texas is a right-to-work state. This means that under the Texas Labor Code, a person cannot be denied employment because of membership or non-membership in a labor union or other labor organization. Tex. Labor Code Ann. §§ 101.001, et al.

7. What tort claims are recognized in the employment context?

a. Texas recognizes the tort of “intentional infliction of emotional distress” but only as a “gap-filler” when the other statutes do not specifically address the wrongs asserted. It is applicable only when "a defendant intentionally inflicts severe emotional distress in a manner so unusual that the victim has no other recognized theory of redress." Hoffmann--La Roche Inc. v. Zeltwanger, 144 S.W.3d 438, 447 (Tex. 2004). The elements of the tort are: 1) the defendant acted intentionally or recklessly; 2) the defendant's conduct was extreme and outrageous; 3) the conduct caused the plaintiff emotional distress; and 4) the emotional distress was severe. Id. "Extreme and outrageous" conduct means conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Hoffmann--La Roche, 144 S.W.3d at 445; GTE Sw., Inc. v. Bruce, 998 S.W.2d 605, 611 (Tex. 1999). Conduct that does not rise to the level of conduct actionable includes insensitive or even rude behavior, mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. GTE, 998 S.W.2d at 612. It is for the court to determine, in the first instance, whether a defendant's conduct was extreme and outrageous. Id. However, when reasonable minds may differ, it is for the jury to determine whether the conduct was sufficiently extreme and outrageous to result in liability. Id.

b. Harassment claims are covered by the Texas Commission on Human Rights Act, and thus subject to the administrative exhaustion requirements and damages caps. Waffle House, Inc. v. Williams, 313 S.W.3d 796 (Tex. 2010).

In B.C. v. Steak N Shake Operations, Inc., No. 15-0404 (Tex., Feb. 24, 2017), the Texas Supreme Court held: (1) where the gravamen of a plaintiff's claim is not harassment, but rather, a single assault by a "vice principal", the Texas Commission on Human Rights Act (TCHRA) does not preempt the plaintiff's common law assault claim; and (2) because the gravamen of Plaintiff's complaint in this case was assault, Defendant did not establish, as a matter of law, that Plaintiff's claim was preempted by the TCHRA. The case was reversed and remanded.

c. Texas recognizes three invasion of privacy claims in the employment arena –

i. Intrusion upon seclusion – K Mart v. Trotti, 677 S.W.2d 632 (Tex. App. – Houston [1st Dist.] 1985, writ ref'd n.r.e.).

ii. Appropriating the likeness or name of another - Kimbrough v. Coca-Cola/U. S. A., 521 S.W.2d 719 (Tex.Civ.App.1975)
iii. Public disclosure of private facts - Industrial Found. of the South v. Texas Indus. Accident Bd., 540 S.W.2d 668, 682

d. A fraud claim is often tied in with a breach of contract claim. However, the Supreme Court of Texas has decided that at-will employees may not bring an action for fraud that is contingent on the promise of continued at-will employment. The Court also held that employees subject to a collective bargaining agreement are bound by the agreement's exclusive remedies provision and are similarly barred from asserting fraud claims. Even though the Court did not entirely bar fraud claims relating to termination of employment, the decision is nevertheless consistent with the Court's protection of the at-will doctrine and its refusal to expand the duties owed by employers when terminating employment. Sawyer, et. al v. E. I. du Pont de Nemours & Co., 12-0626 (Tex. April 25, 2014). The Court reasoned that a representation dependent on continued at-will employment cannot be material since employment may terminate at any time. Similarly, at-will employees may not justifiably rely on the promise of continued employment when employment is terminable at will. Without a material representation or detrimental reliance, which are essential elements of a fraud clams, the employees' claims cannot survive. Id. What remains after this is a possible cause of action that may be based on representations made before employment.

8. Is there a common or law statutory prohibition against discrimination / hostile work environment?

Employees may not be discharged because of their membership in a protected class - i.e., race, color, disability, national original, age, religion, and sex. Tex. Labor Code §21.051. A claimant has a right to a jury trial after exhausting his/her administrative remedies. If successful, a claimant can recover the following damages:

i. Reinstatement (if viable)/injunctive relief
ii. Back pay and benefits
iii. Future pay and benefits
iv. Actual (Compensatory) Damages
v Punitive (Exemplary) Damage
vi. Attorney's fees
vii. Court costs

Employees may not be discharged because of genetics. Tex. Labor Code §21.402. The remedy - an individual who discloses genetic information in violation of the Texas Commission on Human Rights Act (TCHRA) is liable for a civil penalty of not more than $10,000. TEX. LAB. CODE §21.403(e).

Texas does not have a statutory prohibition regarding veteran/military status, but it does have the Texas Veteran's Employment Preference Act, Tex. Govt. Code, §657, which provides:

a) An individual who qualifies for a veteran's employment preference is entitled to a preference in employment with or appointment to a state agency over other applicants for the same position who do not have a greater qualification.

(b) A state agency shall provide to an individual entitled to a veteran's employment preference for employment or appointment over other applicants for the same position who do not have a greater qualification a veteran's employment preference, in the following order of priority:

(1) a veteran with a disability;

(2) a veteran;

(3) a veteran's surviving spouse who has not remarried; and

(4) an orphan of a veteran if the veteran was killed while on active duty.

Section 657.003.

There is no statewide prohibition against discrimination based on sexual orientation or sexual identity; however, several cities have passed ordinances banning such discrimination, including Austin, Dallas, Ft. Worth, and Plano. Other cities have passed regulations prohibiting discrimination in city employment, including Denton, San Antonio, El Paso, Brownsville, Houston, Waco, and Grand Prairie.

9. Is there a common law or statutory prohibition of retaliation?

Texas maintains statutory prohibitions of retaliation for the following claims:

a. Discrimination - Employees may not be retaliated against for opposing a discriminatory practice, making a discrimination charge, filing a discrimination complaint, or testifying, assisting, or participating in an investigation, proceeding, or hearing of discrimination. Tex. Labor Code §21.055. A claimant has a right to a jury trial after exhausting his/her administrative remedies. If successful, a claimant can recover the following damages:

i. Reinstatement (if viable)/injunctive relief
ii. Back pay and benefits
iii. Future pay and benefits
iv. Actual (Compensatory) Damages
v Punitive (Exemplary) Damage
vi. Attorney's fees
vii. Court costs

b. Worker's Compensation – Employees may not be retaliated against for filing a worker's compensation claim in good faith or testifying in a proceeding. See Tex. Lab. Code Ann. §21.001 et seq., §451.001. A successful claimant is entitled to reasonable damages including punitive damages, reinstatement, and injunctive relief.

c. Whistle Blowing - A public employee may not be discharged in retaliation for reporting a violation of the law by their employing governmental entity or another public employee to a law enforcement authority. Tex. Gov't Code Ann. §554.002. Additionally, neither public employees nor their supervisors or managers may be subject to retaliation for using the local government grievance process or for reporting a violation of the local government ethics code. Tex. Local Gov't Code Ann. §161.157.

A public employee who sues and is successful, is entitled to the following damages:

(1) reinstatement to the employee's former position or an equivalent position;

(2) compensation for wages lost during the period of suspension or termination;

(3) reinstatement of fringe benefits and seniority rights lost because of the suspension or termination;

(4) injunctive relief;

(5) actual damages;

(6) court costs; and

(7) reasonable attorney fees.

d. Safety Complaints - An employer who is licensed under Texas's Assisted Living Facilities laws may not retaliate against an employee for filing a complaint, presenting a grievance, or providing in good faith information relating to personal care services. Tex. Health & Safety Code Ann. § 247.068(a).

An employer is prohibited from discharging or suspending an employee in retaliation for reporting an alleged violation of an occupational health or safety law via the Safety Violations Hotline (through the Texas Department of Insurance, Workers' Compensation Division). However, the report must be made in good faith. Tex. Lab. Code Ann. § 411.082.

An employer who is licensed under Texas's Home and Community Support laws may not retaliate against an employee for filing a complaint, presenting a grievance, or providing in good faith information relating to home health, hospice, or personal assistance. Tex. Health & Safety Code Ann. § 142.0093(a).

An employer may not retaliate against a nurse "who reports, without malice…" "any situation that the nurse has reasonable cause to believe exposes a patient to substantial risk of harm as a result of a failure to provide patient care that conforms to minimum standards of acceptable and prevailing professional practice or to a statutory, regulatory, or accreditation standards." Tex. Occ. Code §301.4025 and §301.413.

i. Voting – Texas makes it a criminal offense – Class C misdemeanor - for an employer to interfere with an employee's right to vote by means of loss or reduction of wages or any other benefit:

> A person commits an offense if, with respect to another person over whom the person has authority in the scope of employment, the person knowingly:
>
> > refuses to permit the other person to be absent from work on election day for the purpose of attending the polls to vote; or
> >
> > subjects or threatens to subject the other person to a penalty for attending the polls on election day to vote.
>
> It is an exception to the application of this section that the person's conduct occurs in connection with an election in which the polls are open on election day for voting for two consecutive hours outside of the voter's working hours.

Tex. Election Code §276.004.

e. Other - An employee may not be discharged for reporting fraud or falsification of a Medicaid claim. Tex. Hum. Res. Code § 36.115.

An employee may not be retaliated against for reporting suspected child abuse. Tex. Fam. Code § 261.110.

10. Is the state a deferral state for charges filed with the EEOC?

Texas is a deferral state for charges filed with the EEOC. *White v. Dallas Independent School Dist.*, 566 F.2d 906 (5th Cir. 1978).

11. Are there any state laws related to compensation, including wage and hour, paid time off, mandatory breaks, fringe benefits, allowable deductions, prevailing wage rates for public contracts, etc.?

Chapter 61 of the Texas Labor Code governs the payment of wages in Texas:

> "Wages" means compensation owed by an employer for:
>
> > labor or services rendered by an employee – to include on a time, task, piece, commission, or other basis; and
> >
> > vacation, holiday, sick leave, parental leave, or severance pay. *See* Tex. Labor Code § 61.001(7).
>
> Paydays: an employer shall pay wages to each employee who is exempt from the overtime pay provisions of the FLSA at least once a month (at least twice per month for all other employees). *Id*. at § 61.011.
>
> > If an employer fails to designate paydays, the default are the first and fifteenth of each month. *Id*. at § 61.012(b).
>
> Final or Severance Pay: In the case of termination, an employer must issue the final paycheck within six calendar days of discharge, but an employee who leaves employment other than by discharge must receive "pay in full…not later than the next regularly scheduled payday." *Id*. at § 61.014
>
> Deduction from wages: an employer may not withhold or divert any part of an employee's wages unless the employer:
>
> > is ordered by a court of competent jurisdiction;
> >
> > is authorized to do so by state or federal law; or
> >
> > has written authorization from employee for a lawful purpose. *Id*. at § 61.018
>
> The Texas Payday Law sets forth an employer's obligation with respect to the payment of wages, and enables an employee to file a claim with the Texas Workforce Commission, which "provides a streamlined process for obtaining relief to workers with smaller claims that might be too cumbersome to pursue in court." *Abatement Inc. v. Williams*, 324 S.W.3d 858, 863 (Tex. App. – Hou. [14th Dist.] 2010, pet. denied). However, the statutory right under the Texas Payday Law does not represent an employee's exclusive remedy, but "is rather an alternative remedy that is cumulative of the common law." *Igal v. Brightstar Info. Tech. Group*, 250 S.W.3d 78, 88 (Tex. 2008).
>
> Filing Wage Claims: an employee must file a wage claim "in the manner and on a form prescribed by the commission."
>
> > the claim must be filed not later than the 180th day after the wages became due;
> >
> > the employee may file the claim in-person at the office of the commission; by mail to an address designated by the commission, or by fax to a number designated by the commission.

See Tricon Tool & Supply, Inc. v. Thurmann, 226 S.W.3d 494, 508 (Tex. App. – Hou. [1st Dist.] 2006, pet. denied) (noted "[t]he Payday Act is not an employee's sole and exclusive remedy for a claim based on past wages, but is, rather, an alternative remedy that is cumulative of remedies under the common law.")

See also; *Abatement Inc. v. Williams*, 324 S.W.3d 858 (Tex. App. – Hou. [14th Dist.] 2010, pet. denied) (noted how a worker asserting a denial of wages has a choice either to file an administrative claim with the Texas Workforce Commission (TWC) under the Payday Law or a common law breach of contract claim in district court.)

Holmans v. Transource Polymers, Inc., 914 S.W.2d 189 (Tex. App. – Ft. Worth 1995, writ denied) (recognized "the objective of the Texas Payday Act is to deter employers from withholding wages by providing wage claimants an avenue for the enforcement of wage claims, many of which would be too small to justify the expense of a civil lawsuit.").

Once a wage claim is filed with the TWC, an examiner with the commission will analyze the claim, and if it sets forth facts actionable under the act, will investigate the claim and issue a preliminary wage determination order either dismissing the claim or "ordering payment of wages determined to be due and unpaid." *See* Tex. Labor Code § 61.052. Not later than the 21st day after the commission mails the preliminary wage determination order, either party may submit a written request for a hearing before the wage claim appeal tribunal. *Id*. at § 61.054. If an employer is found to have acted in bad faith in not paying wages, the commission may enter an administrative penalty against the employer, which may not exceed the lesser of (1) the amount of the wages in question or (2) $1000. *Id*. at § 61.053.

Pipes v. Hemingway, 358 S.W.3d 438, 448 (Tex. App.- Dallas 2012, pet. denied) (noted how "once a claimant who has alternate proceedings at his disposal to obtain relief available under the Payday Law pursues an administrative claim to a final decision, he forgoes his common law claims.").

After the exhaustion of administrative remedies, a party may bring suit to appeal the order. *Id*. at § 61.062. Suit must be filed not later than the 30th day after the final order is mailed, which the trial court will review de novo. *Id*. at § 61.062.

Attorney Fees – *Stewart Automotive Research, LLC v. Nolte*, 465 S.W.3d 307 (Tex. App. – Hou. [14th Dist.] 2015, n.p.h.) (Statutory provision on attorney fees in TWC actions authorizes an award of attorney fees only in lawsuits in a certain county's district court that were either (1) filed by the commission to enforce a final order or (2) filed against the commission to challenge a notice of assessment.)

But see Tex. Civ. Prac. & Rem. Code § 38.001, which allows for recovery of reasonable attorney's fees related to claims for (1) rendered services or (2) performed labor. As such, a common law claim to recover unpaid wages would allow for the recovery of reasonable attorney's fees to pursue such a claim.

Texas law guarantees that all workers on a public work "shall be paid…not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the work is performed." *See* Tex. Gov't Code § 2258.021. However, the chapter does not prohibit payment to a worker on a public work "an amount greater than the general prevailing rate of per diem wages." *See* Tex. Gov't Code § 2258.025. A contractor or subcontractor awarded a contract by a public body must comply with section 2258.021. A failure to comply with the prevailing wage rate exposes the contract or subcontractor to a penalty of $60 per worker "for each calendar day or part of the day that the worker is paid less than the wage rates stipulated in the contract." *See* Tex. Gov't Code § 2258.023. Only a municipality with a population of more than 10,000 may collect a penalty under the section. *Id*.

Section 2258.022 of the Texas Government Code requires a political subdivision of the state to determine the prevailing rate of per diem wages for a contract for a public work. *See* Tex. Gov't Code § 2258.022. The per diem wage applies in the locality where performance of the public work will take place related to "each craft or type of worker needed to execute the contract," including the rate for legal holiday and over time work. *Id*. The statute requires the public body to conduct a

survey of the wages received by classes of workers employed on projects of a character similar to the contract work in the political subdivision of the state in which the public work is to be performed," or use "the prevailing rate as determined by the United States Department of Labor in accordance with the Davis-Bacon Act." *Id*. Subsection (b) of the statute specifies the method to determine the prevailing wage rates for contracts in counties that border the United Mexican States.

Chapter 62 of the Texas Labor Code sets forth the state's minimum wage requirements:

Texas law mirrors the federal wage - an employer shall pay to each employee the federal minimum wage under Section 6, Fair Labor Standards Act of 1938. *See* Tex. Labor Code § 62.051.

Employees on salary must still be paid at least the minimum wage for all hours worked.

§ 62.057 represents an exception to the above minimum wage standard for patients and clients of Texas Department of Mental Health and Mental Retardation:

(a) A person may be compensated at a percentage of minimum wage if:

(1) the person is a patient or client of a department facility;

(2) the person's productive capacity is impaired;

(3) the person:

(A) assists as part of the person's therapy; or

(B) receives occupation training in a sheltered workshop; and

(4) the facility derives an economic benefit from the person's services

(b) The percentage above must correspond to the impaired productive capacity

(c) The department shall adopt rules to determine the wages and percentage of capacity to implement this section

(d) Services rendered and payment provided does not create and employer-employee relationship Tex. Labor Code §62.057

In addition to the above exemption, there are numerous exemptions to include persons covered by the Fair Labor Standards Act of 1938; persons employed by religious, educational, charitable, or nonprofit organizations; certain professionals, salesperson, and public officials; persons performing domestic duties in a private home; certain youths and students; inmates; employing family members; certain amusement and recreational establishments; agricultural exemptions; and sheltered workers

Mandatory Breaks – FSLA and Texas law do not require employers to give employees a lunch break. The FSLA stipulates that a break of 30 minutes or more constitutes a lunch break, and Texas law follows the FSLA. Further, FSLA does not require employers to compensate employees for this time.

See Hartsell v. Dr. Pepper Bottling Co. of Texas, 207 F.3d 269, 274 (5th Cir. 2000) – held that if the lunch break was predominantly for the benefit of the employer, the employees are entitled to compensation.

Texas does not require employers to offer paid leave.

12. Is there a state statute governing paid or unpaid leaves?

i. Medical – Texas does not have its own family and medical leave laws, but FMLA requires employers with at least 50 employees to give 12 weeks of unpaid time off per year for illness, caregiving, and maternity/paternity

ii. Maternity / paternity – FMLA is in effect in Texas

iii. Military – Like federal law, Texas law prevents employers from terminating a permanent employee who is called to training or active duty. Also, Texas law prevents termination of an employee for being called to active duty in a state emergency. Texas acknowledges the Uniformed Services Employment and Re-employment Rights Act of 1994. See gen. Bradberry v. Jefferson County, Tex., 732 F.3d 540 (5th Cir. 2013)

iv. Voting – Employers must not prevent or retaliate against an employee for voting. It is a criminal violation to refuse an employee to vote during working hours unless the polls are open for at least two consecutive hours outside working hours. Employers cannot retaliate because an employee voted for or refused to discuss whom the employee voted for. See Tex. Election Code § 276.004.

§ Martin v. Clinical Pathology Laboratories, Inc., 343 S.W.3d 885, 894 (Tex. App. – Dallas 2011, pet. denied): held no private cause of action for employee who alleged wrongful termination by employer in retaliation for exercising right to vote under section 276.004 of the Texas Election Code.

v. Jury duty – Employers are not required to pay an employee, but both federal and Texas law prevent termination of employee due to jury service. An employee is generally entitled to return to the same employment. Should an employer terminate an employee because of jury service, the employer can be held liable for damages not to exceed six months' compensation and reasonable attorney's fees. See Tex. Labor Code § 52.051.

1. A private employer may not terminate the employment of a permanent employee because of service as a juror. See Tex. Civ. Prac. & Rem. Code §122.001 and §122.0022.

a. This section represents an exception to at-will employment doctrine by creating a cause of action in favor of an employee whose termination was motivated by that employee's service on jury created new cause of action and would be strictly construed. Fuchs v. Lifetime Doors, Inc., 717 F. Supp. 465 (W.D. Tex. 1989);

b. That employer may have had reasons other than employee's jury service for discharging employee did not put discharge out of reach of this section, insofar as this section did not prohibit termination solely because of jury service. Wright v. Faggan, 773 S.W.2d 352 (Tex. App. - Dallas 1989, writ denied).

13. Is there a state law governing drug-testing?

Texas law mandates drug testing in a variety of different professions. The following represent highlights of drug-testing statutes in Texas.

Section 2034.002 of the Texas Occupations code requires the Texas A&M Veterinary Medical Diagnostic Laboratory or a public/private laboratory selected by the commission in consultation with Texas A&M to perform drug testing on race animals. *See* Tex. Occ. Code § 2034.002(a). Any drug testing performed on a human "must be conducted by a laboratory approved by the commission." *Id*. at § 2034.002(b).

All towing companies in Texas must "establish an alcohol and testing policy for towing operators." *See* Tex. Occ. Code § 2308.158(a). A towing company may adopt the testing model developed by the commission which authorizes at least one scheduled drug test each year for towing operators along with random, unannounced testing. *Id*. at § 2308.158(b).

Convalescent homes, nursing facilities and other related institutions "may establish a drug testing policy for employees of the institutions. *See* Tex. Health & Safety Code § 242.052(a). The institutions may adopt the policy adopted by the executive commissioner, which requires at least one scheduled drug test each year for employees who have direct contact with residents in the institution as well as random, unannounced drug testing of those employees. *Id*. at § 242.052(b).

State supported living centers may conduct random and reasonable suspicion testing related to the use of illegal drugs by a center employee. *See* Tex. Health & Safety Code § 555.022(a). The policy must advise that a center employee may be terminated solely on the basis of a single positive test for the illegal use of a controlled substance. *Id*. at § 555.022(b).

14. Is there a medical marijuana statute?

Texas recently enacted a Compassionate Use Program to allow patients with intractable epilepsy of any age access to Low-THC Cannabis as the plant Cannabis sativa L, which is "any part of that plant or any compound, manufacture, salt derivative, mixture, preparation, resin or oil of that plant that contains:

(a) Not more than 0.5 percent by weight of tetrahydrocannabinols; and

(b) Not less than 10 percent by weight of cannabidiol"

A patient may receive a prescription for low-THC cannabis if (1) the patient is a permanent resident in Texas; (2) the patient is diagnosed with intractable epilepsy; and (3) a qualified physician determines that the risk of medical use of low THC cannabis is reasonable in light of the potential benefit, which must be confirmed by a second qualified physician.

15. Is there trade secret / confidential information protection for employers?

Prior to September 1, 2013 common law defined a trade secret as "any formula, pattern, device, or compilation of information which is used in one's business and presents an opportunity to obtain an advantage over competitors who do not know or use it. *In re Bass*, 113 S.W.3d 735, 739 (Tex. 2003).

After September 1, 2013, the Texas Uniform Trade Secret Act controlled – "information, including a formula, pattern, compilation, program, device, method, technique, process, financial data, or list of actual or potential customers or suppliers that:

a. derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

b. is the subject of efforts that are reasonable under circumstances to maintain its secrecy." Tex. Civ. Prac. & Rem. Code § 134A.002(6).

Under Texas law, a trade secret must be secret; it must be neither generally known by other in the same business nor readily ascertainable by an independent investigation. *A.M. Castle & Co. v. Byrne*, 123 F. Supp. 3d 895 (S.D. Tex. 2015).

The Texas Supreme Court has set forth six non-exclusive factors to consider when analyzing whether information is entitled to trade secret protection:

(1)the extent to which the information is known outside the holder's business;

(2)the extent to which it is known by employees and others involved in the holder's business;

(3)the extent of the measures taken by the holder to guard the secrecy of the information;

(4)the value of the information to the holder and its competitors;

(5)the amount of effort or money expended by the holder in developing the information and;

(6)the ease or difficulty with which the information could be properly acquired or duplicated by others.

Information generally known or readily available does not receive protection, "but the fact that information is discoverable by lawful means does not deprive its owner of protection from one acquiring it by unfair means. *See Fox v. Tropical Warehouses, Inc.*, 121 S.W.3d 853, 858 (Tex. App. – Ft. Worth 2003, no pet.). Information such as customer lists, pricing information, client information, customer preferences, buyer contracts, market strategies, blueprints, and drawings have been shown to represent trade secrets. *T-N-T Motorsports v. Hennessey Motorsports, Inc.*, 965 S.W.2d 18, 22 (Tex. App. – Hou. [1st Dist.] 1998, pet. dism'd).

The court may award reasonable attorney's fees to the prevailing party if:

(1) a claim of misappropriation is made in bad faith;

(2) a motion to terminate an injunction is made or resisted in bad faith; or

(3) willful and malicious misappropriation exists. Tex. Civ. Prac. & Rem. Code § 134A.005

In trade secret actions under § 134A there is a presumption in favor of protective orders and injunctive relief to preserve secrecy of trade secrets, to include:

a. provisions limiting access to confidential information to only the attorneys and their experts;

b. holding in camera hearings;

c. sealing the records of the action; and

d. ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval. Tex. Civ. Prac. & Rem. Code § 134A.006

"In camera hearings," within meaning of Trade Secrets Act provisions requiring trial courts to take reasonable measures to protect trade secrets, refers to proceedings from which a party or its representatives, but not its attorneys, are excluded. *In re M-I LLC*, 505 S.W.3d 569 (Tex. 2016).

Texas Rule of Evidence 507 grants a trade secret privilege to allow a person to refuse "to disclose and to prevent other persons from disclosing a trade secret owned by the person, unless the court finds that nondisclosure will tend to conceal fraud or otherwise work injustice." *See* Tex. R. Evid. 507. The person who owns the trade secret, or the person's agent or employee, may claim the privilege. *Id*.

Section 31.05 of the Texas Penal Code criminalizes the theft of a trade secret. *See* Tex. Penal Code § 31.05. A person commits the offense if, without the owner's consent, knowingly (1) steals a trade secret; (2) makes a copy of an article representing a trade secret; or (3) communicates or transmits a trade secret. *Id*. Such an offense represents a third degree felony. *Id*.

The Texas Supreme Court's decision in Sheshunoff has alleviated some of the prior enforceability concerns about consideration supporting non-compete agreements, but the traditional public policy concerns remain due to former employees' decreased employment opportunities. Alex Sheshunoff Management Services, L.P. v. Johnson, 209 S.W.3d 644 (Tex. 2006). Accordingly, even though the Court arguably removed difficulties to enforce non-competes, it nonetheless emphasized that non-competes should not be taken at face value. The reasonableness of the scope and the burden imposed upon the former employee must be evaluated. As such, lower courts may look intently into whether a non-compete is warranted under the facts, notwithstanding whether the scope and duration of the non-compete is reasonable.

16. Is there any law related to employee's privacy rights?

i. social media – The National Labor Relations Board provides guidance but is not authoritative. It is recommended and the trend in Texas is for an employer to have a written social media policy which is narrowly drafted and does not interfere with the employee's right to discuss conditions, wages, and benefits.

ii. polygraph tests – Texas follows the Federal Employee Polygraph Protection Act of 1988 which generally prevents the use of polygraphs for screening purposes or during the scope of employment (few exceptions apply)

iii. confidential / identity information –

1. Tex. Bus. & Comm. Code § 501.001 (a): cannot print an employee's social security number or require an employee to transmit their social security number over the Internet;

2. Tex. Bus. & Comm. Code § 501.002 provides for a civil penalty not to exceed $500 and the attorney general may bring an action to restrain or enjoin a person from violating the above section;

3. Tex. Bus. & Comm. Code § 521.053 must notify customers or employees of loss of sensitive information via hacking

a. *Bliss & Glennon Inc. v. Ashley*, 420 S.W.3d 379 (Tex. App. – Hou. [1st Dist.] 2014, n.p.h.) – Notice obligation under section 521.053 of person or business responsible for disclosure of particular types of third-party sensitive information to unauthorized person did not equate to obligation to give individual notice and certain information about claims and class to each identifiable member of class in class action under Texas Rule of Civil Procedure 42.

4. Section 552.102 of the Texas Government Code precludes from disclosure the personnel files of government employees, the disclosure of which would constitute an invasion of privacy. *See* Tex. Gov't Code § 552.102. *But see Texas Comptroller of Public Accounts v. Attorney Gen. of Texas*, 354 S.W.3d 336, 342,43 (Tex. 2010) (recognized balancing test between the protection of an individual's right of privacy and the preservation of the public's right to government information).

5. The Texas Government Code likewise precludes from disclosure under the act "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *See* Tex. Gov't Code § 552.101.

6. Section 552.352 imposes a criminal penalty for the distribution of confidential information under the chapter. An officer or employee of a governmental body who intentionally distributes, allows access to, or discloses confidential information commits a misdemeanor punishable with a fine of $1000 and/or confinement in a county jail of not more than six months. *See* Tex. Gov't Code § 552.352.

7. The Texas Education Code limits the disclosure of criminal history information obtained related to an applicant for a teaching certificate in the state. *See* Tex. Edu. Code § 411.090. According to the statute, the State Board of Education may release such information to the person who is the subject of the information, the Texas Education Agency, a local or regional educational entity, and any applicable court order. *Id*.

8. State educational employees retain a confidentiality right to their personal information such as "name, address, phone number, social security number, driver's license number, other identification number and fingerprint records, which may not be released except for limited circumstances such as to the person who is the subject of the information or an applicable court order. *See* Tex. Edu. Code § 22.08391(a).

iv. access to employee communications, including text messages and e-mail: under Texas law, an employee has no reasonable expectation of privacy in the contents of materials stored on a company computer system *McLaren v. Microsoft Corp.*, No. 05-97-00824-CV, 1999 WL 339015, at *4 (Tex. App. – Dallas, no pet.). Importantly, however, a company must establish a policy advising employees of its monitoring of the computer system including emails. The Fifth Circuit Court of Appeals held that an employee had a reasonable expectation of privacy related to information stored on a work computer where the company did not have a written policy informing employees of the monitoring of work computers. *See United States v. Slania*, 283 F.3d 670 (5th Cir. 2002).

1. *Garcia v. City of Laredo, Tex.*, 702 F.3d 788 (5th Cir. 2012) – covers the Stored Communications Act (SCA) which applies to those who "intentionally access without authorization" or "intentionally exceed authorization to access" wire or electronic communication within electronic storage.

2. *U.S. v. Phillips*, 477 F.3d 215 (5th Cir. 2007) differentiates between unauthorized users and "exceeding authorized access."

3. The Texas Harmful Access by Computer Act provides for civil damages if a person "knowingly accesses a computer, computer network, or computer system without the effective consent of the owner." *See* Tex. Penal Code § 33.02(a).

17. Is there any law restricting arbitration in the employment context?

No, the Texas Supreme Court in *In re Halliburton Company* reaffirmed that both Texas and federal law favor pre-dispute

employment arbitration agreements. 80 S.W.3d 566, 568-69 (Tex. 2002); *see also Lucchese Boot Co. v. Rodriguez*, 473 S.W.3d 373 (Tex. App. – El Paso 2015, no pet.). At-will employment does not preclude employers and employees from forming subsequent contracts provided "neither party relies on continued employment as consideration for the contract." *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003). However, an arbitration clause can be found illusory if "one party can avoid its promise to arbitrate by amending the provision or terminating it altogether." *In re Odyssey Healthcare, Inc.*, 310 S.W.3d 419, 422 (Tex. 2010). Therefore, an arbitration provision must not give the employer unilateral power to amend or terminate the provision to avoid a finding of an unenforceable, illusory promise. *See Halliburton*, 80 S>W.3d at 569-70 (held arbitration policy not illusory because of a "'savings clause' – including a ten-day notice provision and a provision that any amendments would only apply prospectively…" A pre-employment arbitration provision can cover statutory claims – such as discrimination – provided "the arbitration agreement does not waive substantive rights and remedies of the statute and the arbitration procedures are fair so that the employee may effective vindicate his statutory rights." *In re Poly-America, L.P.*, 262 S.W.3d 337, 352 (Tex. 2008).

18. Is there any law governing weapons in the employment context?

There is no federal or Texas law prohibiting a company from enforcing a policy barring weapons at work, while in a company vehicle, or on company business. However, section 52.061 of the Texas Labor Code allows concealed carry license holders and those who may legally possess firearms to have such inside their own locked vehicles parked on the employer's property.

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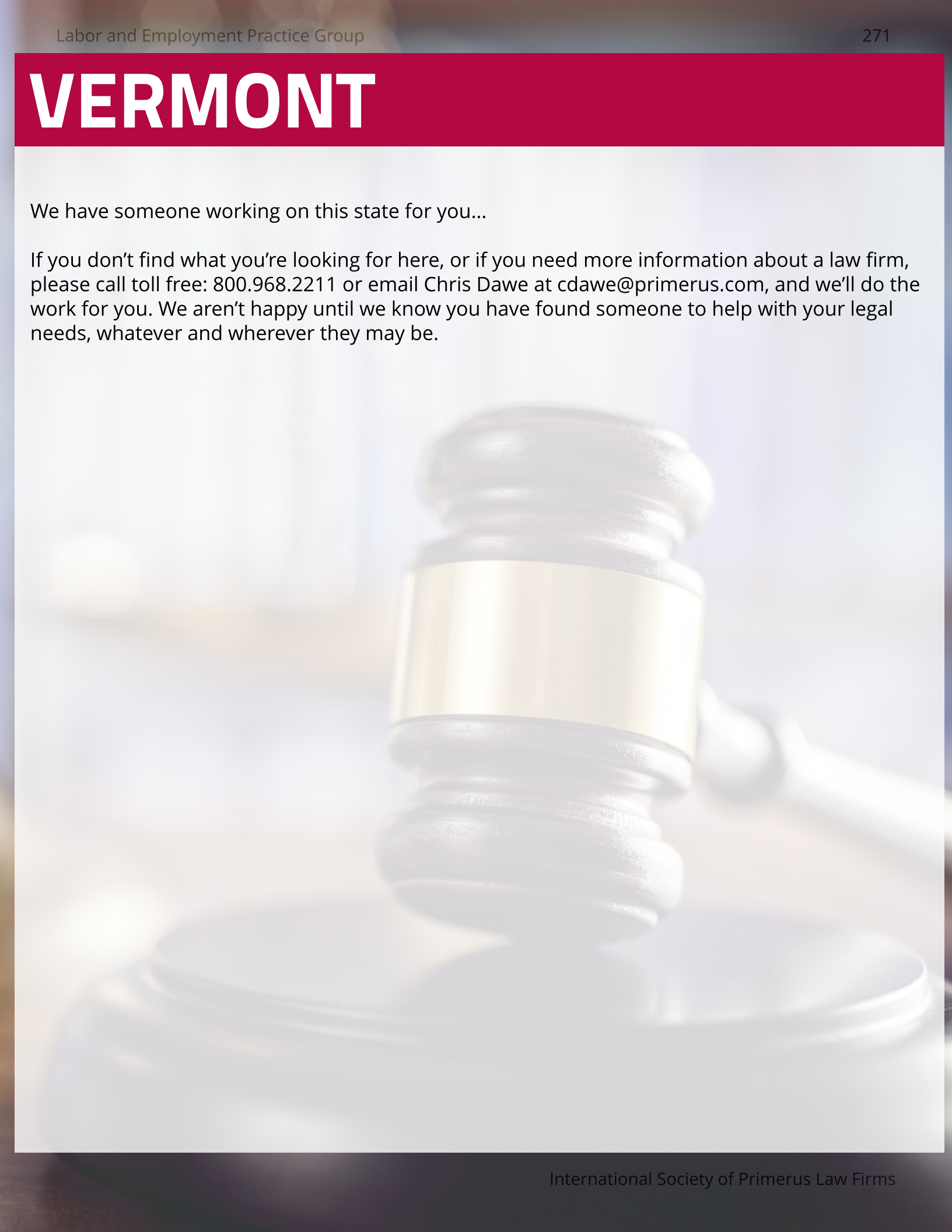

VIRGINIA

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1. Is the state generally an employment-at-will state?

It is settled law that Virginia follows the employment-at-will doctrine so that either the employer or the employee may terminate the employment relationship for any or no explanation with reasonable notice. *Stonega Coal & Coke Co. V. Louisville &N. R. Co.,* 106 Va. 233, 55 S.E. 551, 552 (1906). In the context of at-will employment, "reasonable notice" simply means "effective notice that wthe employment relationship has ended, " rather than "advanced notice." *Johnston V. William E Wood & Assoc., Inc.,* 292 Va. 222, 227, 787 S.E.2d 103, 105 (2016).

2. Are there any statutory exceptions to the employment-at-will doctrine?

Virginia does not have a statute that expressly states exceptions to the at-will doctrine; however, Virginia does recognize implied exceptions based on statute. These exceptions are “narrow” exceptions, and apply where an employee is terminated for exercising a statutorily created right or in violation of public policy stated in a statute. *Rowan v. Tractor Supply Co.*, 263 Va. 209, 559 S.E.2d 709, 711 (2002) (summarizing and applying the seminal case Bowman v. State Bank of Keysville, 229 Va. 534, 331 S.E.2d 797 (1985)).

Some statutory exceptions under Virginia state law include the following:

Refusing to take an unauthorized lie detector test. Va. Code Ann. § 40.1-51.4:4

Being subject to a garnishment or child support order. Va. Code Ann. § 34-29(f)

Filing a complaint, testifying, or exercising rights under the state safety and health laws. Va. Code Ann. § 40.1-51.2:1

Serving on a jury or appearing in court pursuant to a summons or subpoena. Va. Code Ann. §§ 18.2-465.1. 19.2-1101

Filing a workers’ compensation claim or testifying in a workers’ compensation proceeding. Va. Code Ann. § 65.2-308

An employee in a nursing or assisted living facility may not be discharged for reporting improper care. Va. Code Ann. § 63.2-1730.

A public employee cannot be discharged in retaliation for disclosing wrongdoing by a government agency in good faith. Va. Code. Ann. § 2.2-3011.

Additionally, as an exception to the at-will employment doctrine, public employees have rights under State Grievance Procedure in certain situations. See Va. Code Ann. § 2.2-3000, *et seq.*

3. Are there any public policy exceptions to the employment-at-will doctrine?

a. Public Policy Exceptions

The employment-at-will doctrine is not absolute. In the case of *Bowman v. State Bank of Keysville*, 229 Va. 534 (Va. 1985), the Supreme Court of Virginia recognized a “narrow exception” to the at-will employment doctrine. This narrow exception allows at-will employees to state a claim for wrongful discharge if they can identify a public policy that was violated by the termination of their employment. *Id.* at 331. The Supreme Court of Virginia has noted that “[w]hile virtually every statute expresses a public policy of some sort, we continue ... to hold that termination of an employee in violation of the policy underlying any one statute does not automatically give rise to a common law cause of action for wrongful discharge.” *Rowan v. Tractor Supply Co.*, 263 Va. 209, 213, 559 S.E.2d 709, 711 (2002).

In fact, in only three circumstances or "scenarios" has the Supreme Court of Virginia concluded that a claim was sufficient to constitute a common law cause of action for wrongful termination of an at-will employee under the Bowman public policy exception:

(1) When "an employer violated a policy enabling the exercise of an employee's statutorily created right" (citing Bowman);

(2) When "the public policy violated by the employer was explicitly expressed in the statute and the employee was clearly a member of that class of persons directly entitled to the protection enunciated by the public policy" (citing Lockhart v. Commonwealth Educ. Sys. Corp., 247 Va. 98 (1994) (holding that plaintiffs' protected class status supported wrongful discharge; but noting, in 1995 the Virginia legislature amended the Virginia Human Rights Act to abrogate common law causes of action for wrongful discharge under the Act));

(3) When "the discharge was based on the employee's refusal to engage in a criminal act." (citing Mitchem v. Counts, 259 Va. 179, 190, 523 S.E.2d 246, 252 (2000)) (holding discharge based upon refusal to engage in fornication and lewd and lascivious cohabitation to be against public policy).

Francis v. Nat'l Accrediting Comm'n of Career Arts & Scis., Inc., 293 Va. 167, 172–73, 796 S.E.2d 188, 190–91 (2017) (holding that termination after employee received preliminary protective order against co-worker did not violate public policy.).

b. Remedies

As the Supreme Court of Virginia stated in *Bowman*, the common law cause of action for wrongful termination of employment sounds in tort. 229 Va. at 125. Further, wrongful discharge is an intentional tort and, under Virginia common law, when a plaintiff pleads and proves an intentional tort, the trier of fact may award punitive damages. *Shaw v. Titan Corp., 255 Va. 535, 545 (1998).*

c. Individual Supervisor Liability

Virginia recognizes that the cause of action for wrongful termination based on violations of public policy may be asserted against a supervisor or manager who participated in the wrongful firing. *VanBuren v. Grubb*, 284 Va. 584, 590, 733 S.E.2d 919, 922 (2012).

d. Exclusive Remedies and Criminal Conduct—Sexual Misconduct

Some statutes relied upon for to support a public policy violation have clauses making statutory or administrative remedies the exclusive means of redress for wrongful termination based upon discrimination or discharge in retaliation. The "exclusivity rule" provides that where a new right is created by statute, the remedy provided for its violation is exclusive. *See, e.g., Sch. Bd. v. Giannoutsos*, 238 Va. 144, 147, 380 S.E.2d 647, 649 (1989). For instance, the Virginia Human Rights Act precludes common law causes of action for wrongful termination based upon race, religion, national origin, sex, age, marital status, disability, and any other policy stated in the Act. Virginia Code Ann.§ 2.2-3900; *Doss v. Jamco, Inc.,* 254 Va. 362, 371, 492 S.E.2d 441, 446 (1997). Note that even though plaintiffs may not predicate Bowman claims for sexual harassment on the Virginia Human Rights Act, the same facts could become actionable by implicating Virginia's criminal code. VanBuren v. Grubb, 284 Va. 584, 590, 733 S.E.2d 919, 922 (2012) (finding the plaintiff had been discharged because she had refused to engage in criminal conduct: adultery and "open and gross lewdness and lasciviousness" in violation of Va. Code Ann. §§ 18.2-345 and 18.2-365.).

Virginia state law has not unequivocally recognized a cause of action for constructive discharge; and even so, Virginia courts have been divided on whether or not the public policy exception includes cases based upon constructive discharge, in addition to actual discharge. Faulkner v. Dillon, 92 F. Supp. 3d 493, 498, 2015 IER Cases 179578, 2015 WL 1291411 (W.D. Va. 2015) (collecting cases); Gochenour v. Beasley, 47 Va. Cir. 218, 221 (Cir. Ct. 1998) ("The circuit courts have pretty much evenly split on the question of whether a constructive discharge claim can be used in a wrongful termination case in the Commonwealth of Virginia."); compare Peyton v. United S. Aluminum Prods., Inc., 49 Va. Cir. 187, 188 (Cir. Ct. 1999) (holding that a Bowman-style claim was properly pleaded where Plaintiff was "forced to resign"), with Jones v. Prof'l Hosp. Res., Inc., 35 Va. Cir. 458, 460 (Cir. Ct. 1995) ("The policy underlying the [the exception to the at-will doctrine] does not contemplate the resignation of an employee followed by an action for wrongful discharge.").

4. Is there any law related to the hiring process?

a. Immigration

The Immigration Reform and Control Act (IRCA) is the predominant federal regulation overseeing immigration. To comply with IRCA, the employer (1) must not knowingly hire unauthorized aliens, (2) must verify each employee's identity and work status, and (3) must maintain records on its verification and hiring process. 8 U.S.C. § 1324a. Virginia law requires that all public bodies provide in every written contract with a contractor that he or she will not knowingly violate the IRCA. Va. Code Ann. § 2.2-4311.1.

In addition, all application forms used by State and local governments and privately owned businesses operating in the Commonwealth "shall ask prospective employees if they are legally eligible for employment in the United States;" it is a Class 1

misdemeanor to hire an individual not authorized to work in the United States. Va. Code Ann. § 40.1-11.1.

b. Background

An employer may not refuse to hire an applicant because he or she refuses to answer questions about arrest or conviction records that have been expunged. Va. Code Ann. § 19.2-392.4. However, criminal history record information may be disseminated for investigations of applicants for employment in situations enumerated by Va. Code Ann. § 19.2-389. In particular, this code section may apply in the context of employment by a "public service company" (as defined in Va. Code §56-1) (1) if the job will involve personal contact with the public or (2) when past criminal conduct would be incompatible with the nature of employment under consideration.

c. Medical history

The Americans with Disabilities Act prohibits employers form requiring a medical examination, inquiring into medical history, or asking about workers compensation claims until a conditional job offer has been extended. 42 U.S.C. § 12112(d). Virginia expands this protection by disallowing employers from requiring employees to pay the cost of a medical examination or the cost of furnishing any medical records required by the employer as a condition of employment. Va. Code §§ 40.1-28.7:1 and 40.1-28.

Virginia does impose a requirement that certain types of employees, such as medical personnel, law enforcement officers, and fire-fighters, submit to HIV testing if another person is exposed to the employee's bodily fluids in a way that may transmit HIV. Va. Code § 32.1-37.2(A).

d. Employment history

The Virginia Code explicitly allows for an applicant's former employer to share information regarding that individual's job performance and performance evaluations; the statute operates to immunize the former employer from civil liability so long as the former employer is not acting in bad faith. Va. Code Ann. § 8.01-46.1; *see also* discussion of defamation *infra*. If the trier of fact determines that an employer acted in bad faith, punitive damages. *Id.*

5. Does the state recognize implied employment contracts under employment handbooks, policies, or practices?

Employee handbooks and manuals are prone to be interpreted as contacts that modify the presumption of at-will employment, or that may grant employees other rights incident to their employment (such as paid vacation time, severance benefits, etc.). Whether an employee handbook amounts to a contract between employer and employee is a question of fact. *Barger v. Gen. Elec. Co.,* 599 F. Supp. 1154, 1162-64 (W.D. Va. 1984). Consequently, clear statements inconsistent with an implied contract, such as a provision in the handbook providing for "at-will" employment, settles the matter. *See Miller v. SEVAMP, Inc.,* 234 Va. 462, 467 (1987). Even less definitive statements will preserve the at-will employment relationship – such as when the handbook states that an employee "may be discharged" for cause. *Cty. of Giles v. Wines*, 262 Va. 68, 73, (2001); *Progress Printing Co. v. Nichols,* 244 Va. 337, 343, 421 S.E.2d 428, 431 (1992). Conversely, a statement that an employee shall only be dismissed for cause modifies the at-will relationship. *Norfolk S. Ry. Co. v. Harris*, 190 Va. 966, 976, 59 S.E.2d 110, 114–15 (1950).

A federal court interpreting Virginia law has found that an employer may retract an employee handbook containing provisions that modify the at-will relationship, but only if the court finds the ingredients of a new contract: offer, acceptance, and consideration. *McBride v. City of Roanoke Redevelopment & Hous. Auth.,* 871 F. Supp. 885, 889 (W.D. Va. 1994).

6. Does the state have a right to work law or other labor / management laws?

Virginia currently has a right-to-work statute that bans employers from requiring union membership. Under Virginia Code §§ 40.1-58, *et seq.,* the right to work shall not be abridged or denied on account of membership or nonmembership in a labor union or organization. Thus, agreements by a labor organization to deny nonmembers right to work or where membership is made condition of employment is prohibited.

7. What tort claims are recognized in the employment context?

a. Intentional Infliction of Emotional Distress

Intentional infliction of emotional distress requires a plaintiff to make out four elements: (1) the wrongdoer's conduct was intentional or reckless; (2) the conduct was outrageous or intolerable; (3) there was a causal connection between the wrongdoer's conduct and the resulting emotional distress; and (4) the resulting emotional distress was severe. *SuperValu, Inc. v. Johnson, 276 Va. 356, 370 (2008).* The tort of intentional infliction of emotional distress is "not favored" in Virginia because of the inherent problems in proving a claim alleging injury to the mind or emotions in the absence of accompanying physical

injury. Id.

Virginia courts have clarified that the tort is directed at individual conduct intended to cause personal, emotional damage to another individual, rather than business conduct intended to cause economic damage to another business or to an individual. *SuperValu, Inc. v. Johnson*, 276 Va. 356, 371 (2008). Although a person may be so closely associated with the operation of a business that economic damage to that business may result in damage to the individual's emotional state, the tort of intentional infliction of emotional distress does not encompass such personal consequences of business conduct. *Id.* However, that is not to say that intentional infliction of emotional distress claims cannot survive when made in the employment context – though the bar for recovery is high. *See, e.g., Chesapeake & Potomac Telephone Co. v. Dowdy*, 235 Va. 55 (1988) (holding that "nit-picking" and criticism resulting in irritable bowel syndrome was insufficient to support a claim).

A plaintiff meeting each of the aforementioned elements is entitled to compensatory damages. Recovery of attorney's fees by a prevailing party is not the norm in most cases because Virginia follows the "American Rule" which provides that "[g]enerally, absent a specific contractual or statutory provision to the contrary, attorney's fees are not recoverable by a prevailing litigant from the losing litigant." *REVI, LLC v. Chicago Title Ins. Co*., 290 Va. 203, 213, 776 S.E.2d 808, 813 (2015).

b. Negligent Infliction of Emotional Distress

Under Virginia law, a claim for negligent infliction of emotional distress requires a plaintiff to show by clear and convincing evidence that the emotional injury caused by the defendant resulted in (caused) physical consequences for the plaintiff. *Delk v. Columbia/HCA Healthcare*, 259 Va. 125, 137–38 (2000). A plaintiff may recover in such a case only if he or she shows a clear and unbroken chain of causal connection between the negligent act, the emotional disturbance, and the physical injury. Id.

c. Harassment/Assault/Battery

Assault and battery, often alleged together, are distinct doctrines with distinct elements. An assault is any threatening act that puts another person in reasonable fear of physical injury. *See Moore v. Jefferson Hosp., Inc.,* 208 Va. 438 (1967). Battery is an offensive touching– however slight–of another person. *See Woodbury v. Courtney,* 239 Va. 651 (1990). Virginia does not recognize a common law tort for harassment outside of those alleged within the confines of assault, battery, emotional distress, wrongful discharge or another tort.

d. Invasion of Privacy

No general right to privacy exists in the law of Virginia, except for a statute prohibiting the unauthorized use of a person's name or picture (i.e. their likeness). See Va. Code Ann. § 8.01-40.

e. Actual Fraud

In the employment context, fraud may manifests when an employee alleges that the employer has fraudulently induced the employee from his or her pervious employment. In order to recover for actual fraud, six elements must be shown by clear and convincing evidence: (1) a false representation (2) of a material fact (3) made intentionally and knowingly by the defendant (or his agent) (4) with the intent that the false representation mislead (5) and upon which the plaintiff reasonably relied, (6) which resulted in damage to the plaintiff. *Cohn v. Knowledge Connections, Inc.,* 266 Va. 362, 367 (2003).

The ordinary remedy in action for fraud is pecuniary so that the defrauded party is restored to his or her position prior to the fraud. *Murray v. Hadid*, 238 Va. 722, 731 (1989). Damages may include consequential damages, lost profits, punitive damages, and – in extraordinary circumstances – damages based on embarrassment. *Sea-Land Serv., Inc. v. O'Neal*, 297 S.E.2d 647, 653 (Va. 1982). Where the fraud is accompanied by actual malice, punitive damages may be awarded. *Jordan v. Sauve*, 219 Va. 448, 452, 247 S.E.2d 739, 741 (1978). Further, the plaintiff may be entitled to attorney's fees, subject to the court's discretion. *See Prospect Development Co. v. Bershader*, 258 Va. 75, 92 515 S.E.2d 291, 301 (1999) ("We hold that in a fraud suit, a chancellor, in the exercise of his discretion, may award attorney's fees to a defrauded party.")

f. Constructive Fraud

Constructive fraud differs from actual fraud in that the misrepresentation of material fact is not made with the intent to mislead, but is made innocently or negligently although resulting in damage to the one relying on it. *Cohn v. Knowledge Connections, Inc., 266 Va. 362, 369 (2003).* Otherwise, the elements are the same. Punitive damages are proper in a negligence action when the negligence "is so willful or wanton as to evince a conscious disregard of the rights of others." Wingate v. Insight Health Corp., 87 Va. Cir. 227, 242 (Cir. Ct. 2013). As constructive fraud arises from innocent or negligent misrepresentations, it is unlikely to involve the willful and wanton mental state necessary to substantiate punitive damages.

g. Defamation

Virginia does not differentiate between libel and slander; rather, the two are bundled together under the tort of "defamation."

Defamation claims frequently arise in the employer-employee relationship, especially in conjunction with employee discipline and termination, or when an employer serves as a reference for a former employee.

Though the standard fluctuates depending on the facts and circumstances of the alleged defamation, the general elements are (1) an actionable statement (factual, false and defamatory), (2) published, (3) with the requisite intent. *See Gazatte, Inc. v. Harris,* 229 Va. 1, 325 S.E.2d 713 (1985). In Virginia, statements suggesting someone is unfit to perform his or her job requirements or lacks integrity in the job, as well as those statements that tend to "prejudice" someone in his or her profession are considered defamation *per se*. *Fleming v. Moore,* 221 Va. 884, 899 (1981).

Typically in Virginia, employers are protected under the "qualified privilege" defense when responding to a defamation claim. For statements to have "qualified privilege," both parties involved in the communication must have an interest in the communication to claim such privilege. *See, e.g., Southeastern Tidewater Oppurtunity Project v. Bade*, 246 Va. 273, 276 (1993). This means that, even if the employer has a legitimate interest in making statements about a former employee, if the other person involved in the communication doesn't have any corresponding interest, there may be a valid defamation claim against the business. *See Raytheon Technical Servs. Co. v. Hyland*, 273 Va. 292, 301 (2007). Qualified privilege can be overcome if it is shown by clear and convincing evidence that (1) the statements were made with knowledge that they were false or with reckless disregard for the truth; (2) the statements were communicated to third parties who have no duty or interest in the subject matter; 93) the statements were motivated by personal spite or ill will; (4) the statements included strong or violent language disproportional to the occasion or (5) the statements were not made in good faith. *Cashion v. Smith*, 286 Va. 327, 339 (2013).

h. Tortious Interference with Contractual Relations and Economic Advantage

In Virginia, tortious interference has four discrete elements: (1) the existence of a valid contractual relationship or business expectancy, (2) knowledge of the relationship or expectancy on the part of the interferer, (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy, (4) resultant damage to the party whose relationship or expectancy has been disrupted. *Chaves v. Johnson,* 230 Va. 112, 120, 335 S.E.2d 97, 102 (1985). Note that malice is not required – merely the interferer's knowledge of the business relationship and his or her intent to disrupt it. *Id.* However, where the contract at issue is terminable at will (as in many employment contexts), a plaintiff must allege and prove that the defendant employed "improper methods"—i.e. that the interference was intentional and improper under the circumstances of the particular case. *Lewis-Gale Medical Center v. Alldredge*, 282 Va. 141 (2011). Such improper methods may include independently illegal or tortious conduct, bribery, unfounded litigation, defamation, duress, undue influence, misuse of inside or confidential information, breach of a fiduciary relationship, violations of an established standard or trade, fraud or deceit, unethical conduct, sharp dealing, overreaching, or unfair competition. *Id. But see* Va. Code. Ann. § 40.1-27.

i. Duty of Loyalty

Virginia also recognizes that general duty of loyalty owed by employees to their employers. *Community Counseling Service, Inc. v. Reilly,* 317 F.2d 239 (4th Cir. 1963). In *Reilly*, the Fourth Circuit stated that "until the employment relationship is finally severed . . . the employee must prefer the interests of the employer to his own." Though the Supreme Court of Virginia has acknowledged that employees may take steps to prepare to leave their employment, this preparation may grow into a breach of the duty of loyalty. *See Feddeman& Co. v. Langan Associates*, 260 Va. 35, 530 S.E.2d 668 (2000); *Williams v. Dominion Technology Partners, L.L.C.,* 265 Va. 280, 576 S.E.2d 752 (2003).

Employees in a position of trust or confidence may owe a higher fiduciary duty. As a general rule, Virginia's federal and state courts have held that an employee is a fiduciary with respect to the confidential information that the employee obtains in the course of employment. *National Legal Research Group v. Lathan*, Civ. Action No. 92-0031-C, 1993 U.S. Dist. LEXIS 6681, 1993 WL 169789 (W.D. Va. May 17, 1993), *aff'd*, 42 F.3d 1386 (4th Cir. 1994).

8. Is there a common law or statutory prohibition against discrimination / hostile work environment?

Summary of Rights

The Virginia Human Rights Act (VHRA) located at Va. Code § 2.2-3900, et seq., protects employees from discrimination on the basis of race, color, religion, national origin, age, and disability, pregnancy, childbirth or related medical conditions (including lactation).The VHRA works in tandem with the Federal anti-discrimination laws to make prohibitions applicable to employers having six or more employees. For age discrimination, the VHRA only applies to employers having more than five and less than twenty employees.. For other types of discrimination, the VHRA covers employers having more than five and less than fifteen employees.

Virginia Code Ann. § 44-93.4 prohibits discrimination against members of the Virginia National Guard or Virginia Defense

Force, or a resident of the Commonwealth who is a member of the National Guard of another state from discrimination.

Virginia Code Ann. § 40.1-28.7:1 prohibits the use of genetic information in regard to hiring, failing to promote, discharging or otherwise adversely affecting any terms or conditions of employment; the same statute also prohibits an employer from requesting, requiring, soliciting or administering a genetic test as a prerequisite to employment.

Workers in Virginia are not explicitly protected from discrimination based on sexual orientation and sexual identity by state laws. However, the Virginia Attorney General's Office has issued an advisory opinion (which holds no precedential value) concluding that the VHRA's ban on discrimination on the basis of "sex" also prohibits discrimination on the basis of gender identity and, possibly, sexual orientation. Va. Att'y Gen. Op. No. 15-070 (May 10, 2016). Further, in Virginia public-sector jobs, discrimination on the basis of sexual orientation and gender identity are made illegal by executive order.

Remedies

Importantly, the VHRA does not create or imply causes of action beyond its specific terms. Va. Code Ann. § 2.2-3903. Under the VHRA, an employee may bring an action in the courts having jurisdiction over an employer only if the employer allegedly discharged the employee in violation of the VHRA. Id. Any such action must be brought within 300 days from the date of the discharge, unless that employee has filed a complaint with the Division of Human Rights of the Department of Law or a local human rights or human relations agency or commission within 300 days of the discharge Id. Once the Division, or local agency or commission, has rendered a final disposition on the complaint, the employee has 90 days to bring the action in a Virginia court. Id.

The court may award up to 12 months' back pay with interest at the judgment rate. Id. In any case where the employee prevails, the court shall award attorney fees from the amount recovered, not to exceed 25 percent of the back pay awarded. The court shall not award other damages, compensatory or punitive, nor shall it order reinstatement of the employee.

Military Service

Virginia Code Ann. § 44-93.4 prohibits discrimination against members of the Virginia National Guard or Virginia Defense Force, or a resident of the Commonwealth who is a member of the National Guard of another state from discrimination.

9. Is there a common law or statutory prohibition of retaliation?

a. Discrimination Claims

Virginia does not recognize a common law claim for retaliatory discharge based on discrimination claims. Va. Code Ann. § 2.2-3903; *Doss v. Jamco, Inc.,* 254 Va. 362, 372, 492 S.E.2d 441, 447 (1997) ("[I]n enacting the 1995 amendments to Va. Code Ann. § 2.1-725, the General Assembly plainly manifested an intent to abrogate the common law with respect to causes of action for unlawful termination of employment based upon the public policies reflected in the [VHRA]."). But, see above discussion for cause of action for wrongful discharge under the Virginia Human Rights Act.

b. Workers' Compensation Claims

An employee may not be discharged in retaliation for filing a workers' compensation claim (or intends to file a claim), or testifying in a workers' compensation proceeding. Va. Code Ann. § 65.2-308. Likewise, an employer cannot discharge an employee for excessive absenteeism if the absenteeism was because of a compensable Workers' Compensation injury. Va. Code § 40.1-27.1. These absences can be calculated into an employee's work record for purposes of discharge after all steps of an excessive absenteeism policy have been exhausted. *Id.* In addition, there is a hardship exception available when employee's absence exceeds six months or if the employer's circumstances have changed during such employee's absence so as to make it impossible or unreasonable not to discharge such employee. *Id.*

c. Whistle Blowing

The Virginia Supreme Court has refused to recognize a common-law "whistle blower" retaliatory discharge claim. *Dray v. New Market Poultry Prods., Inc.,* 258 Va. 187, 191, 518 S.E.2d 312, 313(1999). However, Virginia has enacted a statute prohibiting government agencies and contractors from retaliatory discharge against whistleblowers. Va. Code Ann. § 2.2-3010.1.

d. Safety Complaints

An employee may not be discharged (or discriminated against) in retaliation for filing a safety or health complaint, testifying, or exercising a right under Virginia law concerning employee safety and health. Va. Code § 40.1-51.2:1. The Virginia Code provides a private right of action for wrongful termination, Va. Code § 40.1–51.2:2(B), but does not recognize punitive damages as "appropriate relief" for a violation. Prop. Damage Specialists, Inc. v. Rechichar, 292 Va. 410, 416, 790 S.E.2d 237, 240 (2016).

e. Jury Duty/Court Attendance

Any person who is summoned or subpoenaed to appear in a court of law as a crime victim or witness has the same protection as a

person summoned to jury duty. He or she may not be discharged or have any other employment action taken against him or her or be forced to take vacation or sick leave for the appearance. Defendants in criminal proceedings are exempt. Va. Code §§ 18.2-465.1, 19.2-11.01.

10. Is the state a deferral state for charges filed with the EEOC?

Virginia is a "deferral state" for Title VII purposes, meaning that it has a state law prohibiting discriminatory employment practices and has a state or local agency (e.g., the Virginia Council on Human Rights) authorized to grant relief from such practices. In deferral states like Virginia, prior to filing any lawsuit, an aggrieved employee must exhaust administrative remedies by initiating an EEOC charge within 300 days.

11. Are there any state laws related to compensation, including wage and hour, paid time off, mandatory breaks, fringe benefits, allowable deductions, prevailing wage rates for public contracts, etc.?

Virginia does have a Minimum Wage Act and has adopted the federal minimum wage set forth by the Fair Labor Standards Act as its minimum wage. Va. Code Ann. § 40.1-28.10. Virginia minimum wage laws do not apply to all employees entitled to minimum wage under the Fair Labor Standards Act; thus, because most employees in Virginia are subject to the Fair Labor Standards Act, Va. Code 40.1-28.9(B)(12), the provisions of Virginia's minimum wage law do not apply to most employees working in Virginia. Other exclusions are located at within the Virginia Minimum Wage Act at Va. Code 40.1-28.8, *et seq*. Any employer who violates the minimum wage requirements is liable to the affected employee for back wages plus interest; further, the statute permits the court to award attorney's fees. Va. Code Ann. § 40.1-28.12.

Virginia minimum wage laws do not establish a tipped minimum wage and do not require employers to pay tipped employees a cash wage. An employer must, however, ensure that tipped employees receive enough tips so that they are paid the standard minimum wage for all hours worked. If tipped employees do not receive enough tips to be paid the standard minimum wage for all hours worked, the employer must pay employees the deficiency. Va. Code Ann. § 40.1-28.9(D). Virginia minimum wage laws do not address whether an employer may require employees to participate in tip pooling or tip sharing arrangements.

All employers are subject to the Virginia Wage Payment Act. Employers must establish regular pay periods and rates of pay for employees (except executive personnel). Va. Code Ann. § 40.1-29. Employers must pay salaried employees at least once each month and employees paid on an hourly rate at least once every two weeks or twice in each month. *Id.* Failure to do so subjects the employer to a fine up to one thousand dollars, plus attorney's fees. *Id.* Willful failure to do so can result in criminal penalties. *Id.*

Virginia labor laws require employers to provide a lunch period of at least thirty (30) minutes to employees ages fourteen (14) and fifteen (15) when scheduled to work for more than five (5) hours continuously. Va. Code § 40.1-80. Virginia does not require employers to provide breaks, including lunch breaks, for workers sixteen (16) years old or older.

Virginia law generally protects employees from deductions from wages. An employer may not withhold any part of the wages or salaries of any employee except for payroll, wage or withholding taxes or in accordance with law, without the written and signed authorization of the employee. Va. Code Ann. § 40.1-29. An employer may not withhold or deduct any portion of an employee's wages unless it is required or authorized by law (such as a garnishment order), or the employee consents in writing. *Id.* An employer cannot require employees, except executive personnel, to sign agreements permitting deduction of wages that are not otherwise legally permitted. *Id*. An employer may not require an employee or applicant to pay the cost of a medical examination or the cost of furnishing any medical records required by the employer as a condition of employment. Va. Code Ann. § 40.1-28.

12. Is there a state statute governing paid or unpaid leaves?

Virginia law does not require employers to provide employees with sick leave benefits, either paid or unpaid–including maternity and paternity leave.

Virginia does not have a law that requires an employer to grant its employees leave, paid or unpaid, to vote.

An employer is not required to pay an employee for time spent responding to a jury summons or serving on a jury. An employer may not discharge or take any other adverse action against an employee for receiving and/or responding to a jury summons or for serving on a jury if the employee has given reasonable notice of the summons or jury service, or for complying with attendance under a summons or subpoena. Likewise, an employer may not require an employee to take vacation or sick leave when responding to a jury summons or serving on a jury if the employee has given reasonable notice of the summons or jury service. Va. Code Ann. § 18.2-465.1.

13. Is there a state law governing drug-testing?

Virginia legislation does not address drug testing in private employment. This means that employers are free to require or ask employees and applicants to take a drug test, as long as they don't run afoul of other legal protections.

In addition, some professions have an affirmative obligation to establish drug-free workplaces:

> Public contractors who contract more than $10,000 must include provisions outlining drug-free requirements and adhere to certain requirements under Va. Code Ann. § 2.2-4312.
>
> A licensed home health organization under § 32.1-162.7 or any home care organization exempt from licensure under §32.1-162.8, are required to establish a drug-free workplace – which includes testing employees – and report positive results to applicable health regulatory boards responsible for licensing, certifying or registering the person to practice. Va. Code Ann. § 32.1-162.9:1(B).

14. Is there a medical marijuana statute?

Virginia does not allow for possession of marijuana for medical treatments, except for cannabidiol oil or THC-A oil for the treatment of diagnosed conditions or diseases for which a medical practitioner has issued a written certification. Va. Code Ann. § 54.1-3408.3. There are no explicit protections for use in the employment context.

15. Is there trade secret / confidential information protection for employers?

Virginia has adopted the Virginia Uniform Trade Secrets Act, found at Va. Code Ann. § 59.1-336, *et seq.,* which is often referred to as VUTSA to distinguish its minor alterations from the model Uniform Trade Secrets Act (UTSA). Notably, the Virginia Code expands the definition of "improper means" to also include the unauthorized use of a computer or computer network. Va. Code Ann. § 59.1-336.

The VUTSA specifically precludes "conflicting tort, restitutionary, and other law of this Commonwealth providing civil remedies for misappropriation of a trade secret." Va. Code Ann. § 59.1-341. However, the VUTSA does not affect those causes of action emanating from breach of contract claims, criminal remedies, or "other civil remedies not based on misappropriation of trade secrets." Va. Code Ann. § 59.1-341(B); *See, e.g., Stone Castle Fin., Inc. v. Friedman, Billings, Ramsey & Co.,* 191 F. Supp. 2d 652 (E.D. Va. 2002). Courts have interpreted this portion regarding "other civil remedies" to preclude claims "premised entirely on a claim for misappropriation of a trade secret." *Smithfield Ham and Prods. Co., Inc. v. Portion Pac, Inc*., 905 F. Supp. 346, 348 (E.D. Va. 1995); *see also Rogers Elec. of Va., Ltd. v. Sims,* 93 Va. Cir. 484 (2015) (holding that where plaintiffs' allegations were not premised entirely on a claim for the misappropriation of a trade secret, but were merely a component of the conspiracy, the claim was not pre-empted.).

16. Is there any law related to employee's privacy rights?

i. Social Media

Virginia Code Ann.§ 40.1-28.7:5 expressly forbids an employer from forcing either a current or prospective employee to: (1) disclose log-in information – i.e. username and password – attached to a social media account; or (2) add an employee, supervisor, or administrator to the employee's contact or "friends" list on such an account. Employers may not discharge, discipline, or refuse to hire an individual for their exercise of these rights.

The law does not apply to any social media account that the employer sponsors or that the employee creates on the employer's behalf. Employers can still require employees to disclose the employee's log-in information to a social media account if the employer has a "reasonable belief" that the account is "relevant" to the employer's "formal investigation or related proceeding" regarding the employee's violation of federal, state, or local laws or regulations or the employer's written policies. Note, this statutory section does not provide employees with a private right of action to sue their employers.

ii. Polygraph Tests

Virginia does not prohibit the use of lie detector tests in employment situations. However, the state does prohibit the use of certain questions on polygraph tests for employment. Va. Code Ann. § 54.1-1806. Employers cannot, as a condition of employment, require a prospective employee to answer questions in a polygraph test concerning the applicant's sexual activities unless the applicant's sexual activity has resulted in a criminal conviction in Virginia. *Id.;* Va. Code Ann. § 40.1-51.4:3. Any written record of the results of a polygraph examination given to a prospective employee by an employer must either be destroyed or maintained on a confidential basis by the employer and will be open to inspection only if the tested employee agrees. Va. Code Ann. § 40.1-51.4:3.

iii. Confidential / Identity Information

irginia law restricts the use of Social Security numbers (SSNs). Any person or employer in Virginia is prohibited from: (1) intentionally communicating an individual's SSN to the general public; (2) printing an individual's SSN on any card required to access or receive products or services; (3) requiring the use of a SSN to access an Internet website unless a password or other security device is used; or (4) mailing a package with the individual's SSN visible. Va. Code Ann. § 59.1-443.2.

The Virginia Code also aims to protect sensitive personal identifying information, such as home telephone number, mobile telephone number, email address, shift times, or work schedule, by limiting to the circumstances under which they must disclose such information. Va. Code Ann. § 40.1-28.7:4 These circumstances include scenarios where disclosure is mandated pursuant to a judicial order or in response to discovery in a pending legal matter. *Id.*

iv. Access to Employee Communications

Monitoring an employee's phone conversations implicates wiretapping acts under both federal and Virginia law. Under the Federal Wiretapping Act, it is illegal to "intentionally intercept[] . . . any wire, oral, or electronic conversation." 18 U.S.C. § 2511(1)(a). Virginia's statute is substantially similar and can be found at Va. Code Ann. § 19.2-61, et seq. The Virginia Wiretapping Act has a few broad exceptions:

(1) when at least one of the parties to the call has given prior consent to the monitoring, Va. Code Ann. § 19.2-62; and

(2) when the telephone is being used by an employee of a communications common carrier, or wire/electronic service provider. This exception is limited by employee use "in the ordinary course of [the employer's] business." Va. Code § 19.2-61.

Under federal law, stored wire and electronic communications, such as voice mail and e-mail, may be accessed under the authorization of "the person or entity providing a wire or electronic communications service." 18 U.S.C. § 2701(c)(1). A Virginia federal court suggested that this broad statutory acquiescence may be curbed an employee's expectation of privacy, therefore employers should include a statement of their authority to monitor communications in the company policy. U.S. v. Simons, 29 F. Supp. 2d 324 (E.D. Va. 1998), *aff'd in part and remanded in part*, 206 F.3d 392 (4th Cir. 2000).

17. Is there any law restricting arbitration in the employment context?

Virginia Code Ann. § 8.01-581.01 permits contracts between an employer and employee to be resolved by arbitration. The public policy of Virginia favors arbitration.TM Delmarva Power, L.L.C. v. NCP of Virginia, L.L.C., 263 Va. 116, 122, 557 S.E.2d 199, 202, 2002 WL 29350 (2002).

18. Is there any law governing weapons in the employment context?

No. Virginia does not have a law expressly limiting or allowing weapon possession in the workplace. Employees' rights are therefore limited by a company policy or an employment agreement.

19. Miscellaneous employment or labor laws not discussed above?

Non-Competition and Non-Solicitation Agreements

Due to their disfavored status in Virginia law, the validity of restrictive covenants in employment contracts is a frequent source of litigation. *Omniplex World Servs. Corp. v. US Investigations Servs., Inc.,* 270 Va. 246, 249 (2005). Because restrictive covenants restrain trade, non-competition clauses are strictly construed against the employer. *Grant v. Carotek, Inc.,* 737 F.2d 410, 412 (4th Cir. 1984). A seminal case applying Virginia non-competition or non-solicitation law is *Simmons v. Miller*, 261 Va. 561 (2001). There, the Supreme Court of Virginia endorsed a three-factor analysis to determine the reasonableness of a non-competition agreement. Id. at 580-81.

(1) Is the restraint, from the standpoint of the employer, reasonable in the sense that it is no greater than necessary to protect the employer in some legitimate business interest?

(2) From the standpoint of the employee, is the restraint reasonable in the sense that it is not unduly harsh and oppressive in curtailing his legitimate efforts to earn a livelihood?

(3) Is the restraint reasonable from the standpoint of a sound public policy?

These factors are examined with a mind towards: (1) the temporal duration of the restraint; (2) the geographic scope of the restraint; and (3) the scope and extent of the activity being restricted. Id. at 580. These same standards apply when reviewing non-solicitation agreements. *Daston Corp. v. MiCore Sols., Inc.,* 80 Va. Cir. 611, 614 (Cir. Ct. 2010) (*citing Foti v. Cook*, 220 Va. 800, 805, 263 S.E.2d 430, 433 (1980)).

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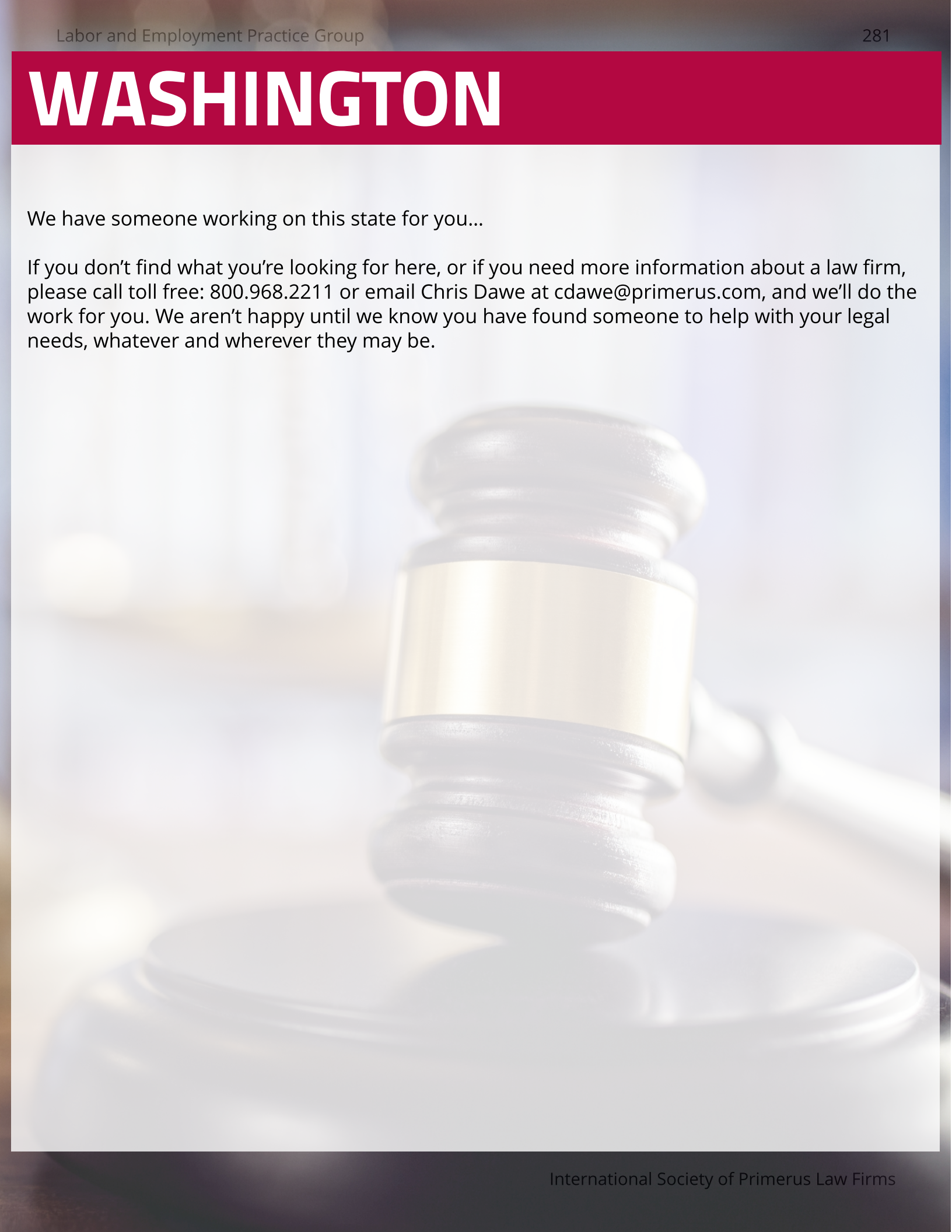

WEST VIRGINIA

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1. Is the state generally an employment-at-will state?

West Virginia is generally an employment-at-will state. See *Williamson v. Sharvest Management Company*, 415 S.E.2d 271 (W.Va. 1992).

2. Are there any statutory exceptions to the employment-at-will doctrine?

There are a variety of West Virginia statutes that restrict an employer's right to discharge an employee, including:

Workers' Compensation: No employer shall terminate an injured employee while the injured employee is unable to work due to a compensable injury, and is receiving, or is eligible to receive, temporary total disability benefits, except where the injured employee committed a separate offense warranting discharge. No employer shall fail to reinstate an employee who has sustained a compensable injury to his or her former position, if it is available and the employee is not disabled. W.Va. Code § 23-5A-3.

No employer shall discharge an employee on the basis of race, religion, color, national origin, ancestry, sex, age, blindness, or handicap. Furthermore, no employer shall engage in any form of reprisal, or otherwise discriminate against a person who files a complaint under the West Virginia Human Rights Act, or opposes any of the forbidden practices contained in the Act. W.Va. Code § 5-11-9.

No employer may threaten to discharge an employee in order to prevent him or her from freely exercising the right to vote. W.Va. Code § 3-9-20.

No employer may discharge an employee because the employee was called to serve on a jury. W.Va. Code § 52-3-1. An employee is entitled to reinstatement after serving on a jury. W.Va. Code § 52-3-1. An employer that threatens to discharge an employee for serving on a jury is subject to fine and/or imprisonment. W.Va. Code § 61-5-25a.

An employer cannot threaten an employee in order to influence his or her political views. W.Va. Code § 3-8-11(b). In addition, the crime of corrupt practices includes an employer threatening an employee with loss of employment if a particular candidate is elected or defeated. W.Va. Code § 3-9-15.

Members of the state militia are entitled to the same reemployment rights as provided veterans under federal law. W.Va. Code §15-1F-1.

No public employer may discharge or discriminate against an employee because he or she has filed a complaint or participated in proceedings under the West Virginia Occupational Safety and Health Act. W.Va. Code § 21-3A-13.

No employer may discharge a member of the volunteer fire or ambulance department because he or she has lost time from employment in responding to an emergency. W.Va. Code § 21-5-17.

No public employer may discharge or discriminate against an employee who has made a good faith report about instances of wrongdoing or waste (whistle-blower). W.Va. Code § 6C-1-3.

An employer may not discharge an employee because a creditor has garnished or attempted to garnish his or her wages to satisfy a judgment arising from a consumer credit loan. W.Va. Code § 46A-2-131.

An employer cannot terminate an employee solely because of the employee's mental illness, mental retardation, addiction,

or receipt of mental health services. W.Va. Code § 27-5-9(a). However, under W.Va. Code § 21-3E-9, if an employee fails a drug test in violation of the employer's written policy, or if an employee refuses to take the test, the employer may discipline the employee, up to and including termination.

An employer cannot terminate an employee for making complaints under the Equal Pay for Equal Work Act. W.Va. Code §§ 21-5B-1 through 6.

An employer cannot terminate against an employee based on his service in the Legislature. W.Va. Code § 6-5-11.

An employer cannot terminate an employee for use of tobacco products during nonworking hours. W.Va. Code § 21-3-19.

An employer cannot terminate an employee who refuses to pay the costs of a medical examination. W.Va. Code § 21-3-17.

No employer shall discharge or otherwise discriminate against a miner who has notified a supervisor or authorized official of any alleged mine safety violation or danger, has filed a proceeding under West Virginia's mine safety laws, or has testified in any mine safety proceeding. W.Va. Code § 22A-1-22.

No nursing home shall discharge or otherwise discriminate against an employee who has filed a complaint or participated in a proceeding governed by state nursing home laws. W.Va. Code § 16-5C-8.

No employer may discharge or discriminate against an employee who has complained to the employer or to the commissioner of labor that they have not been paid in accordance with the minimum wage and maximum hours of the state. W.Va. Code § 21-5C-7.

3. Are there any public policy exceptions to the employment-at-will doctrine?

The general principle that an employee may be discharged at any time for any reason should is subject to exceptions when the termination contravenes a substantial public policy. *Harless v. First National Bank of Fairmont*, 246 S.E.2d 270 (W. Va. 1978). Instances of substantial public policies include:

Discharge on the sole basis that the employee received services for mental illness, mental retardation, or addiction. *Hurley v. Allied Chemical Corp.,* 262 S.E.2d 757 (W. Va. 1980) (citing W. Va. Code § 27-5-9(a) as a source of public policy).

Discharging the employee for filing a claim under the Workers' Compensation Act, W. Va. Code § 23-5A-1 et seq. *Shanholz v. Monongahela Power Co*., 270 S.E.2d 178 (W. Va. 1980); *Powell v. Wyoming Cablevision, Inc*., 403 S.E.2d 717 (W. Va. 1991).

Firing for refusal to take a lie detector test (polygraph) is a violation of public policy. *Cordle v. General Hugh Mercer Corp*., 325 S.E.2d 111 (W. Va. 1984).

Discharge for reporting wage and hour laws violations. *McClung v. Marion County Commission*, 360 S.E.2d 221 (W. Va. 1987).

The provisions of the West Virginia Mine Safety Act, W. Va. Code § 22A-1A-20, prohibiting retaliatory conduct by employers for reporting violations of the Mine Safety Act, are a substantial public policy. *Collins v. Elkay Mining Co.,* 371 S.E.2d 46 (W. Va. 1988); see also *Wiggins v. Eastern Associated Coal Corp*., 357 S.E.2d 745 (W. Va. 1987).

Discharge in retaliation for exercising one's rights under the Veterans Reemployment Rights Act. 38 U.S.C. § 2021 et seq. *Mace v. Charleston Area Medical Center Foundation, Inc*., 422 S.E.2d 624 (W. Va. 1992).

Discharge for refusing to operate unsafe company vehicles on roadways. *Lilly v. Overnight Transportation Company*, 425 S.E.2d 214 (W. Va. 1992).

Discharge for refusal purchase goods in lieu of wages. *Roberts v. Adkins*, 444 S.E.2d 725 (W. Va. 1994).

Discharge because of an employee's anticipated or actual truthful testimony in a legal action. *Page v. Columbia Natural Resources, Inc.*, 480 S.E.2d 817 (W. Va. 1996).

Discharge for providing truthful information to an investigation of the West Virginia Board of Barbers and Cosmetologists is a protected exception to the at-will employment doctrine. *Kanagy v. Fiesta Salons, Inc.,* 541 S.E.2d 616 (W. Va. 2000).

Discharge for the use of self-defense in response to a lethal imminent danger is a substantial public policy. *Feliciano v. 7-Eleven, Inc.,* 559 S.E.2d 713 (W. Va. 2001).

A public employee subject to grievance procedures under W. Va. Code § 18-29-1 cannot be fired while the grievance

4. Is there any law related to the hiring process?

The West Virginia Human Rights Act prohibits hiring practices that discriminate on the basis of race, color, religion, age, sex, national origin, ancestry, blindness, or disability, unless based on a bona fide occupational qualification exists. W. Va. Code Sec. 5-11-1 *et seq*. Employers may not publish job advertisements that indicate any preference, limitation, specifications or discrimination based upon race, religion, color, national origin, ancestry, sex, disability or age. W. Va. Code § 5-11-9(2)(B). Employers are also prohibited from asking job applicants about a protected characteristic or using an application form to obtain such information. The use of a quota system to deny or limit employment on the basis of a protected characteristic is also unlawful. W. Va. Code § 5-11-9(2)(C). However, employers MAY give hiring preference to veterans W. Va. Code § 5-11-9(1); W.Va. Code §5-11-9a.

Employers may conduct drug and alcohol tests on prospective (and current) employees. W. Va. Code § 21-3E-4. See also *Baughman v. Wal-Mart Stores, Inc*., 215 W.Va. 45, 592 S.E.2d 824 (2003) (Private employers may conduct pre-employment drug screening of applicants because the applicant, as opposed to a current employee, has a lowered expectation of privacy).

5. Does the state recognize implied employment contracts under employment handbooks, policies, or practices?

The Supreme Court of Appeals of West Virginia has recognized that under certain circumstances, an implied employment contract may be evidenced by an employee handbook if the handbook contains language that appears to be a promise by the employer to terminate an employee only for specific reasons. *Cook v. Heck's Inc*., 342 S.E.2d 453 (W.Va. 1986); *Hogue v. Cecil I. Walker Mach. Co*., 431 S.E.2d 687 (W. Va. 1993). However, an employer is not bound by any statements made in an employee handbook if the handbook contains a clear and prominent disclaimer that employment is “at-will” or if the employee acknowledges in his employment application or receipt of employee handbook that his or her employment is “at- will.” *Suter v. Harsco Corp.*, 403 S.E.2d 751 (W. Va. 1991).

6. Does the state have a right to work law or other labor / management laws?

West Virginia does have a right to work law, codified at W.Va. Code § 21-5G-2 and W.Va. Code §21-1A-3. In September 2017, the West Virginia Supreme Court of Appeals dismissed a lower court's preliminary injunction that blocked the state from implementing right to work legislation passed in 2016. The right to work law allows employees to withdraw from union membership and stop paying any dues, fees, or other financial support to an unwanted union.

7. What tort claims are recognized in the employment context?

Intentional Infliction of Emotional Distress (“Outrage”)

West Virginia recognizes the tort of intentional infliction of emotional distress. See *Travis v. Alcon Laboratories*, 202 W. Va. 369, 504 S.E.2d 419 (1998). To recover under this theory, a plaintiff must prove that four elements. First, the defendant’s conduct was atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency. The existence of a special relationship in which one person has control over another, such as an employer-employee relationship, may produce a character of outrageousness that otherwise might not exist. Second, the defendant acted with the intent to inflict emotional distress, or acted recklessly when it was certain or substantially certain emotional distress would result from his conduct;

Third, the actions of the defendant caused the plaintiff to suffer emotional distress. The requirement of causation is satisfied by showing a logical sequence of cause and effect between the actions of the defendant and the plaintiff's injury Fourth, the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it. The finder of fact may consider the intensity and duration of the duress in determining its severity.

Negligent Infliction of Emotional Distress

West Virginia recognizes the tort of negligent infliction of emotional distress. *See Heldreth v. Marrs,* 188 W. Va. 481, 425 S.E.2d 157 (1992). To recover under this theory, a plaintiff must prove that the serious emotional injury suffered by the plaintiff was reasonably foreseeable to the defendant based on the following factors:

(1) the plaintiff was closely related to the injury victim;

(2) the plaintiff was located at the scene of the accident and was aware that it was causing injury to the victim;

(3) the victim is critically injured or killed; and

(4) the plaintiff suffers serious emotional distress.

In the context of a negligent infliction of emotional distress claim where physical injury is absent, a party may assert a claim for expenses related to future medical monitoring necessitated solely by fear of contracting a disease from exposure to toxic

chemicals. *See Bower v. Westinghouse Electric Corporation,* 206 W. Va. 133, 522 S.E.2d 424 (1999).

Interference with Prospective Economic Advantage

West Virginia permits a cause of action for tortious interference with prospective business relationships. *See Torbett v. Wheeling Dollar Savings and Trust Company,* 173 W. Va. 210, 314 S.E.2d 166 (1983). The elements of this action are:

(1) the existence of a contractual or business relationship or expectancy;

(2) an intentional act of interference by a party outside that relationship or expectancy;

(3) proof that the interference caused the harm sustained; and

(4) damage

An employer may defend by proving justification or privilege, both of which are affirmative defenses. *See Bryan v. Massachusetts Mutual Life Insurance Co*., 178 W. Va. 773, 364 S.E.2d 786 (1987). Further, defendants are not liable for interference that is negligent, rather than intentional, or if defendants demonstrate defenses of legitimate competition between the plaintiff and themselves, their financial interest in the induced party's business, their responsibility for another's welfare, their intention to influence another's business policies in which they have interest, their giving of honest, truthful requested advice, or other factors that show the interference was proper.

Invasion of Privacy

An invasion of privacy includes four elements: (1) an unreasonable intrusion upon the seclusion of another; (2) an appropriation of another's name or likeness; (3) unreasonable publicity given to another's private life; and (4) publicity that unreasonably places another in a false light before the public. *Benson v. AJR, Inc.,* 599 S.E.2d 747, 748, 215 W. Va. 324, 325 (2004).

8. Is there a common law or statutory prohibition against discrimination / hostile work environment?

The West Virginia Human Rights Act prohibits discrimination in the terms or conditions of employment on the basis of race, religion, color, national origin, ancestry, sex, age (40 or older), blindness, disability, or familial status for public employers and private employers with 12 or more employees. W. Va. Code §§ 5-11-1, *et seq*. The Act imposes a duty on employers to ensure that workplaces are free of harassment and discrimination on these bases from whatever source. Employers may not print or publish any employment notice or advertisement that indicates any preference, limitation, specification, or discrimination based on a protected characteristic. Employers are also prohibited from asking job applicants about a protected characteristic or using an application form to obtain such information. The use of a quota system to deny or limit employment on the basis of a protected characteristic is also unlawful. W. Va. Code §5-11-9. West Virginia does not require the filing of an administrative charge with the Human Rights Commission before filing suit. *Price v. Boone County Ambulance Authority*, 175 W. Va. 616 (1985). Claims for damages are not limited by statute, and attorneys' fees are recoverable. W. Va. Code § 5-11-13(c).

It is a discriminatory practice under the WVWCA to terminate an injured employee while the employee is off work because of a compensable injury and is receiving or is eligible to receive temporary total disability benefits (unless the injured employee has committed a separate dischargeable offense). W.Va. Code § 23-5A-3(a). In addition, an employee is generally entitled to reinstatement after the employee is physically able to return to work. *Id*.

9. Is there a common law or statutory prohibition of retaliation?

With respect to common law protections, an employee may not be discharged for a reason that contravenes public policy. Specifically, West Virginia courts have protected the following employee activities (see case references above):

Filing a workers' compensation claim;

Refusing to falsify workplace safety reports;

Filing a lawsuit against an employer (to obtain overtime wages);

Refusing to participate in unlawful conduct;

Defending yourself from robbery / danger (self-defense); and

Statutory Protections.

West Virginia employees have the benefit of several statutory protections against retaliation:

Discrimination:

Employers may not engage in any form of reprisal, or otherwise discriminate against a person who files a complaint under the Human Rights Act or opposes any of the forbidden practices contained in the Act. W. Va. Code § 5-11-9(7)(C).

Miners' Health and Safety:

An employee may not be discharged (or discriminated against) in retaliation for the following protected activities:

Reporting an alleged violation or danger to the coal mine operator or West Virginia Office of Miners' Health, Safety & Training

Filing or instituting a proceeding under West Virginia's miner safety laws

Testifying in a proceeding under West Virginia's miner safety laws W. Va. Code § 22A-1-22(a).

Nursing Home Employees:

A nursing home employee may not be discharged (or discriminated against) in retaliation for filing a complaint or participating in a proceeding to report abuse and neglect of a resident. W. Va. Code § 9-6-12(b).

Additionally, an employee may not be discharged (or discriminated against) in retaliation for assisting the Long-Term Care Ombudsman in the furtherance of their duties. W. Va. Code § 16-5L-18.

Public Employees:

An employee may not be discharged (or discriminated against) for reporting wrongdoing or waste to their employer or to the appropriate authority. W. Va. Code § 6C-1-3.

Wage and Hour Violations:

An employee may not be discharged (or discriminated against) in retaliation for filing a complaint, instituting a proceeding, filing a petition or criminal complaint, or testifying in a proceeding under West Virginia's wage and hour laws (which includes minimum wage laws). Employers who discharge an employee for this reason are guilty of a misdemeanor and may be fined $100 to $500 per violation. W. Va. Code § 21-5C-7(a).

Workers' Compensation:

An employee may not be discriminated against in retaliation for filing (or attempting to file) a workers' compensation claim. W. Va. Code § 23-5A-1.

Occupational Safety and Health:

A public employer may not discharge or discriminate against an employee because he or she has filed a complaint or participated in proceedings under the West Virginia OSH Act. W. Va. Code § 21-3A-13.

10. Is the state a deferral state for charges filed with the EEOC?

Yes, the West Virginia Human Rights Commission serves as West Virginia’s deferral agency for charges filed with the EEOC.

11. Are there any state laws related to compensation, including wage and hour, paid time off, mandatory breaks, fringe benefits, allowable deductions, prevailing wage rates for public contracts, etc.?

Like many states, West Virginia has enacted its own set of wage and hour laws, and notable code sections include:

Employers must pay employees wages at a rate not less than $8.75 per hour or the federal minimum wage, whichever is greater. W. Va. Code § 21-5C-2(a).

Employees may pay a subminimum training wage of not less than $6.40 per hour to new employees under the age of 20 years old. This training wage rate may not last more than 90 days. W. Va. Code § 21-5C-2(b).

Employers are prohibited from paying an employee of one sex more than an employee of the other sex for comparable work in both private and public sectors. W.Va. Code § 21-5E-3; § 21-5B-3.

Employers must pay non-exempt employees an overtime rate of one and a half times the employee’s regular rate for every hour worked in a week over 40. W. Va. Code § 21-5C-3.

Employers must provide employees a meal break of at least 20 minutes during any work day 6 hours or longer. W. Va. Code §\

21-3-10a.

12. Is there a state statute governing paid or unpaid leaves?

Parental Leave:

The West Virginia Parental Leave Act provides that all full-time state government employees and employees of boards of education who have been employed for12 or more consecutive weeks are entitled to 12 weeks of unpaid family leave when certain conditions occur within the family structure, such as the birth of a child, the placement of a child by adoption or to care for an immediate family member or dependent that has a serious health condition. W. Va. Code § 21-5D-4. Following completion of family leave, the employee must be returned to his or her former position. W. Va. Code § 21-5D-6.

Medical Leave:

Under the West Virginia Code, public employees accrue sick leave with pay and benefits on the basis of hours equal to 1.5 days per month for full-time employees. W. Va. CSR § 143-1-14. Sick leave is accrued at the end of each pay period or on the last workday for separating employees. Part-time employees accrue sick leave in proportion to the hours they work. W. Va. CSR § 143-1-14. Accrued sick leave may be used for illness or injury of the employee, death in the employee's immediate family (up to 3 days), exposure to contagious disease when a doctor states in writing that the employee's presence may jeopardize the health of others, pregnancy, and routine dental and medical appointments of the employee. W. Va. CSR § 143-1-14. Sick leave may also be taken for routine dental and medical appointments of members of the employee's immediate family, limited to 3 hours per occurrence and 40 hours per year. Sick leave may be accrued on an unlimited basis. W. Va. CSR § 143-1-14.

Vacation Leave:

The West Virginia Code requires that State employees must receive the following paid holidays:

New Year's Day, the first day of January; Martin Luther King's Birthday, the third Monday of January; Presidents' Day, the third Monday of February; Memorial Day, the last Monday in May; West Virginia Day, the twentieth day of June; Independence Day, the fourth day of July; Labor Day, the first Monday of September; Columbus Day, the second Monday of October; Veterans' Day, the eleventh day of November; Thanksgiving Day, the fourth Thursday of November; Lincoln's Day, the fourth Friday of November; Christmas Day, the twenty-fifth day of December; any day on which a Primary or General election is held throughout the State, and, such other days as the President, Governor or other duly constituted authority proclaim to be official holidays or days of special observance or thanksgiving, or days for the general cessation of business. W. Va. CSR § 143-1-14.

However, West Virginia private employers are not required to provide employees with vacation benefits, either paid or unpaid. If an employer voluntarily chooses to provide such benefits, such employer must comply with the terms of its established corporate/organizational policy or employment contract. W Va. Code § 21-5-1(c) & (l), 3(a). In this regard, an employer may lawfully do the following with respect to vacation leave:

> Establish a policy or enter into a contract denying employees payment for accrued vacation leave upon separation from employment. The forfeiture policy must be clearly stated in the employer's established policy or employment contract. See *Meadows v. Wal-Mart Stores, Inc*., 207 W. Va. 203 (1999).
>
> Establish a policy or enter into a contract disqualifying employees from payment of accrued vacation upon separation from employment if they fail to comply with specific requirements, such as giving two weeks' notice or being employed as of a specific date of the year, if the forfeiture policy is clearly and explicitly stated in the employer's established policy or employment contract. See *Meadows v. Wal-Mart Stores, Inc.,* 207 W. Va. 203 (1999)

An employer is required to pay accrued vacation to an employee upon separation from employment if its policy or contract requires it. W. Va. Code 21-5-1(c) & (l), 3(a). Further, an employer is required to pay accrued vacation leave upon separation from employment if the employer's established policy or employment contract is silent on the matter. *See Meadows v. Wal-Mart Stores, Inc*., 207 W. Va. 203, 530 S.E.2d 676 (WV Sup. Ct. 1999). However, an employer may cap the amount of vacation leave an employee may accrue over time. *See Meadows v. Wal-Mart Stores, Inc*., 207 W. Va. 203, 530 S.E.2d 676 (WV Sup. Ct. 1999). Specifically, an employer may implement a policy requiring employees to use their leave by a set date or lose any such accrued time, so long as the employee has agreed to the policy in writing. *See Meadows v. Wal-Mart Stores, Inc*., 207 W. Va. 203, 530 S.E.2d 676 (WV Sup. Ct. 1999).

Jury Duty Leave:

An employer is not required to pay an employee for time spent responding to a jury summons or serving on a jury. An employer must excuse an employee from work for the day or days required in serving as a juror if the employee shows his or

her jury summons to the employer, including his or her immediate supervisor, on the next workday after receiving the summons. W.Va. Code § 52-1-21

Voting Leave:

Employers must provide an employee with up to 3 hours of paid leave to vote so long as the employee has requested the time off to vote in writing at least 3 days before to the day of the election or vote. W. Va. Code § 3-1-42. Employers are *not* required to provide paid leave to vote to employees who have three (3) hours of off-duty time to vote while polls are open but voluntarily choose not vote. W. Va. Code § 3-1-42. In essential government, health, hospital, transportation and communication services and in production, manufacturing and processing works requiring continuity in operation, an employer may arrange employees' schedules on the day of an election or vote so as to cause the least amount of interruption to business operation as possible. Such an employer must ensure, however, that each employee has sufficient time to vote while polls are open. W. Va. Code § 3-1-42.

Military Leave:

State employees who are members of the National Guard or armed forces reserve are entitled to military leave of absence from their jobs without loss of pay, status, or efficiency rating on the days during which they are ordered, by properly designated authority, for the following purposes:

Drills, inactive duty training, parades, funeral details, service schools or other duty, during business hours; or

Field training or active service for the state.

Leave for these qualifying purposes must be granted for a maximum period of 30 working days, not to exceed 240 working hours in any one calendar year. W. Va. Code § 15-1F-1.

State employees who are ordered or called to active duty by the properly designated federal authority are entitled to military leave of absence without loss of pay, status, or efficiency rating for a maximum period of 30 working days for a single call to active duty. W. Va. Code § 15-1F-1.An employee who has any paid days remaining for leave to attend drills, parades, or other state duty may add those unused days to his or her leave entitlement for federal duty, not to exceed 60 days for a single call to duty in any calendar year. W. Va. Code § 15-1F-1.Civil Air Patrol Leave: W. Va. Code § 15-1K-5 requires employers with more than 15 employees to provide employees who are members of the West Virginia wing of the Civil Air Patrol the following unpaid Civil Air Patrol leave:

Up to a maximum of 10 days per calendar year for emergency mission training.

Up to a maximum of 30 days per calendar year for emergency mission response.

13. Is there a state law governing drug-testing?

The Safer Workplace Act, W.Va. Code § 21-3e-1, *et seq*., permits employers to test employees and applicants for drugs and alcohol as a condition of continued employment or hiring. W. Va. Code § 21-3e-4. As long as an employer adheres to the accuracy and fairness safeguards outlined in the Act, the employer qualifies for immunity from certain legal claims stemming from its good-faith actions based on the results of a drug or alcohol test. *Id*; § 21-3E-11. The safeguards and fairness requirements are detailed in W. Va. Code§ 21-3e-5 - 16, and include:

The employer must publish any mandatory drug and alcohol testing policy in writing. The policy must be distributed to every current employee and made available to prospective employees to review;

The employer must pay for the cost of testing;

The testing must be done during or immediately before or after the employee's regular work period;

The employer must compensate the employee for time spent submitting to the test(s) and for transportation or reasonable travel costs if the testing is not conducted on site;

All positive tests must be confirmed by a second test;

Employees have the right to challenge initial results have the right to have a split sample tested by another lab, but must do this at their own expense;

Employers must keep all drug and alcohol results confidential.

If an employer receives a confirmed drug test result indicating a violation of the employer's written policy, or if an employee refuses to take the test, the employer may discipline the employee, up to and including termination.

14. Is there a medical marijuana statute?

The Medical Cannabis Act, codified at W.Va. Code §16A-3-1, *et seq*., legalizes the use, possession, and distribution of marijuana to treat serious medical conditions, while also providing employees with protection from discrimination based on the employee's certification for use of medical marijuana. The Medical Cannabis Act will not be fully implemented until at least July 1, 2019.

Under the Act, employers may not "discharge, threaten, refuse to hire or otherwise discriminate or retaliate against an employee" solely based on that employee's status as a medical marijuana user. W. Va. Code § 16A-15-4. However, employers are not required to make accommodations for the use of medical marijuana on employer property. *Id*. The Act does not prohibit an employer from disciplining an employee for being under the influence of marijuana – even if the use is medicinal-- in the workplace or while working "when the employee's conduct falls below the standard of care normally accepted for that position." *Id*.

15. Is there trade secret / confidential information protection for employers?

West Virginia's Uniform Trade Secrets Act, codified under W. Va. Code §§ 47-22-1, *et seq*., protects information that (1) derives economic value from not being known to the public and (2) is the subject of reasonable efforts to maintain its secrecy. A trade secret can include a business formula, compilation, pattern, program, device, method, technique, or process which, though neither copyrighted nor patented, is used in the conduct of the owner's business, is not disclosed to the public, and provides the owner with some competitive advantage.

The following factors will likely be considered in determining whether a trade secret exists:

- The extent to which the information is known outside the owner's organization;
- The extent to which it is known by employees and others involved in the organization;
- The extent of measures taken by the owner to guard the secrecy of the information (e.g., labeling the information "Trade Secret" or "Confidential," advising employees of the existence of a trade secret, limiting access to the information within the company on a "need-to-know basis," and controlling company access);
- The economic value of the information to the owner and the owner's competitors;
- The amount of effort or money expended by the owner in developing the information; and
- The ease or difficulty with which the information could be properly acquired or duplicated by others. *State ex rel. Johnson v. Tsapis*, 419 S.E.2d 1 (W. Va. 1992)

If willful and malicious misappropriation occurs, the court may award attorneys' fees to the prevailing party. Attorneys' fees are also permitted if a misappropriation claim is filed in bad faith. W. Va. Code §47-22-4(c).

16. Is there any law related to employee's privacy rights?

Access to Employee Accounts:

Under West Virginia Code § 21-5H-1, employers are generally prohibited from requesting, requiring, or coercing an employee (or a potential employee) to disclose a username and password, password, or any other authentication information that allows access to the employee's (or potential employee's) personal account. Further, the Code bars employers from requesting, requiring, or coercing an employee (or a potential employee) to access the employee's (or the potential employee's) personal account in the presence of the employer. Additionally, the act prohibits employers from compelling an employee (or a potential employee) to add the employer or an employment agency to his or her list of contacts that enable the contacts to access a personal account.

However, West Virginia law does not prevent an employer from:

- Accessing information about an employee (or a potential employee) that is publicly available;
- Requiring an employee to disclose a username or password or similar authentication information for the purpose of accessing:◦An employer-issued electronic device; or
- An account or service provided by the employer, obtained by virtue of the employee's employment relationship with the employer, or used for the employer's business purposes;
- Complying with applicable laws, rules, or regulations; or
- Conducting an investigation or requiring an employee to cooperate in an investigation.

Lastly, the employer may require an employee to share the content that has been reported to make a factual determination, if the employer has specific information about an unauthorized transfer of the employer's proprietary information, confidential information, or financial data, to an employee's personal account.

Polygraph Tests:

An employer cannot terminate an employee for failing to take a psychophysiological detection of deception examination (formerly polygraph) unless the employee's duties require that he engage in the manufacture, storage, distribution or sale of controlled substances or is in law enforcement or the military. W.Va. Code § 21-5-5b.

Identity Information:

Employers are prohibited from asking job applicants about a protected characteristic or using an application form to obtain such information. W. Va. Code § 5-11-9(2)(C)

Confidential Information:

West Virginia law strictly prohibits the disclosure of confidential information related to mental health records. W.Va. Code § 27-3-1.

Video or Electronic Monitoring

The use of video and other electronic surveillance by employers in certain employment settings is prohibited. W. Va. Code §21-3-20.

17. Is there any law restricting arbitration in the employment context?

The FAA preempts state laws which would undercut the enforceability of arbitration agreement. However, the "issue of whether an arbitration agreement is a valid contract if a matter of state contract law" and is "capable of state judicial review." *State ex rel. Clites v. Clawges*, 224 W. Va. 299, 301, 685 S.E.2d 693, 695, 2009 W. Va. LEXIS 88, *1 (W. Va. 2009)

An arbitration clause is presumed to be bargained for and is presumed to intend that the arbitration proceeding is the exclusive means of resolving disputes arising under the contract. However, where a party alleges that the arbitration agreement was "unconscionable or was thrust upon him because he was unwary and taken advantage of, or that the contract was one of adhesion", then the question is whether the arbitration agreement was "bargained for and valid", and that question is a "matter of law for the court to determine by reference to the entire contract, the nature of the contracting parties, and the nature of the undertakings covered by the contract." The validity of arbitration agreements in the employment context is highly fact specific. *State ex rel. Clites v. Clawges*, 224 W. Va. 299, 301, 685 S.E.2d 693, 695, 2009 W. Va. LEXIS 88, *1 (W. Va. 2009) (quoting *Board of Education of the County of Berkeley v. W. Harley Miller, Inc*., 160 W. Va. 473, 236 S.E.2d 439 (1977)).

While a promise of employment in exchange for an agreement to arbitrate may be sufficient consideration, a promise by an employer merely to review an employment application in exchange for a job applicant's promise to arbitrate employment-related disputes not associated with the application process (i.e., a stand-alone agreement) is not sufficient consideration to form a valid arbitration agreement. *State ex rel. Saylor v. Wilkes*, 216 W. Va. 766, 768 (W. Va. 2005).

Forum selection clauses in arbitration agreements are typically viewed with heightened scrutiny if the forum would require the employee to travel far distances from their place of employment. *State ex rel. Clites v. Clawges,* 224 W. Va. 299, 301, 685 S.E.2d 693, 695, 2009 W. Va. LEXIS 88, *1 (W. Va. 2009).

18. Is there any law governing weapons in the employment context?

Recently, West Virginia enacted the Business Liability Protection Act (effective June 8, 2018), which limits the extent to which employers may control their employees' possession of firearms in company parking lots. Under the Act, employers may not:

> prohibit employees or other person lawfully on the premises from storing a lawfully possessed firearm inside of a privately owned vehicle in a company parking lot, as long as the firearm is out of view and locked inside the vehicle;
>
> ask employees about the presence of a firearm locked inside a vehicle or perform an actual search for a firearm within a vehicle on a company parking lot; or
>
> condition employment on an employee's agreement not to keep a firearm locked inside his or her vehicle or on whether an employee holds a concealed carry license.

W. Va. Code § 61-7-14.

The West Virginia Supreme Court of Appeals has recognized the general right of an employee to use a weapon in self-defense in the workplace, holding that "[w]hen an at will employee has been discharged from his/her employment based upon his/her

exercise of self-defense in response to lethal imminent danger, such right of self-defense constitutes a substantial public policy exception to the at will employment doctrine and will sustain a cause of action for wrongful discharge." *Feliciano v. 7-Eleven, Inc*., 559 S.E.2d 713 (W.Va. 2001). The right to stand ground in self-defense extends to one's place of business.

19. Miscellaneous employment or labor laws not discussed above?

Use of Tobacco Off of Work Premises: Employers may not discriminate against an employee (hiring or firing) based on the employee's use of tobacco products off work premises. W. Va. Code § 21-3-19.

Employees with Infectious Venereal Disease: Persons with certain venereal diseases in an infectious stage may not be employed in certain jobs. These jobs include a barber in any barbershop, any position in a bakery, or any position in a hotel, restaurant, eating house, lunch counter, or other public place, as a cook, or cook's helper, or as a waiter, or in any other capacity whatever, where he may come in contact with food about to be served. W. Va. Code § 16-4-18.

Volunteer Fire Members and EMS Personnel: No employer may terminate or use any disciplinary action against an employee who is a member of a volunteer fire department, who is an emergency medical service attendant or a member of an emergency medical service and who, in the line of emergency duty, responds to an emergency call prior to the time he or she is due to report for work and which results in a loss of time from his or her employment. W. Va. Code §21-5-17.

Termination of Educators: West Virginia county boards of education may terminate teachers for a wide range of reasons, including "incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, or the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge." W. Va. Code §18A-2-8.

Recovery of Costs for Unreturned Employer-Provided Property From Discharged Employee: An employer is permitted to deduct the replacement cost of unreturned property from an employee's wages under the following circumstances: (1) the property was provided while performing the employer's business; (2) the value of the employer-provided property is more than $100; and (3) the employee signed a written agreement at the time the employer-owned property was provided to him or her. W. Va. Code § 21-5-4.

WISCONSIN

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1. Is the state generally an employment-at-will state?

Yes.

Under Wisconsin law, the discharge of an at-will employee generally is not wrongful – i.e., actionable – unless "the termination clearly contravenes the public welfare and gravely violates paramount requirements of public interest." …Thus, absent such a public policy violation, unless the parties expressly abrogate the at-will status, such employees are "dischargeable at the whim of the employer."

Bantz v. Montgomery Estates, Inc., 163 Wis. 2d 973, 978, 473 N.W.2d 506, 508 (1991) (citations omitted) (quoting *Brockmeyer v. Dun & Bradstreet*, 113, Wis. 2d 561, 573, 335 N.W.2d 834, 840 (1983), and *Ferraro v. Koelsch*, 124 Wis. 2d 154, 165, 368 N.W.2d 666, 672 (1985)).

2. Are there any statutory exceptions to the employment-at-will doctrine?

Yes. Wisconsin's Fair Employment Act, Wis. Stat. §§ 111.31 – 111.395 ("WFEA"), makes it unlawful to terminate an employee "on the basis of age, race, creed, color, disability, marital status, sex, national origin, ancestry, arrest record, conviction record, military service, use or nonuse of lawful products off the employer's premises during nonworking hours, or declining to attend a meeting or to participate in any communication about religious matters or political matters," and the Wisconsin Employment Peace Act ("WEPA"), Wis. Stat. ch. 111, at § 111.06(1)(c), prevents discharge for union activity.

Further, an employer may not discharge an at-will employee because: the employee was absent from work for jury duty (Wis. Stat. § 756.255); the employee's wages were garnished (§ 812.43); the employee refused to submit to honesty testing or because of the testing results under certain circumstances (§ 111.37(2)(c)); the employee was subpoenaed to testify pursuant to the Children's Code (§ 103.87); the employee testified at a minimum wage law enforcement proceeding (§ 104.10), a WEPA proceeding (§ 111.06(1)(h)), or an occupational, safety and health proceeding (§ 101.595(2)); or the employee suffered a compensable worker's compensation illness or injury under certain circumstances (§ 102.35(3)).

Any complaint under the WFEA must be filed with the state's Equal Rights Division of the Department of Workforce Development ("DWD"), the administrative agency charged with enforcement of employment laws, within 300 days after the alleged discrimination occurs. However, the Wisconsin Court of Appeals has held:

> …compensation discrimination is actionable if an employee received payment within the 300-day period before filing his or her complaint pursuant to a discriminatory compensation decision. It does not matter that the discriminatory compensation decision was made before the 300-day period, nor does it matter when the employee became aware of the discrimination. If the employee received even one paycheck pursuant to the discriminatory compensation decision within 300 days before filing his or her complaint, the complaint is timely.

Rice Lake Harley Davidson v. State of Wisconsin Labor and Industry Review Comm'n, 357 Wis. 2d 621, 644 (2014).

WFEA claims are heard by an Administrative Law Judge ("ALJ") from DWD. Jury trial is not available before an ALJ, or before the Labor and Industry Review Commission ("LIRC") on an appeal of the ALJ's decision. An appeal of a decision of the LIRC is heard by a circuit court judge, and is typically decided on briefs only, or on brief with oral argument, at the court's discretion.

For claims under the WFEA, attorneys' fees and costs are available to the prevailing party at the discretion of the ALJ from DWD who hears the case in the first instance. Reinstatement and back pay are the most typical remedies. However, the WFEA

provides that "[b]ack pay liability may not accrue from a date more than 2 years prior to the filing of a complaint with the department." Wis. Stat. § 111.39(4)(c).

3. Are there any public policy exceptions to the employment-at-will doctrine?

Yes. In *Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 335 N.W.2d 834 (1983), the Wisconsin Supreme Court recognized a "narrow" public policy exception, holding that a discharge was "wrongful" and:

> actionable when the termination clearly contravenes the public welfare and gravely violates paramount requirements of public interest. The public policy must be evidenced by a constitutional or statutory provision. An employee cannot be fired for refusing to violate the constitution or a statute.

113 Wis. 2d, at 573.

The court determined that a contract action was "most appropriate" for wrongful discharge cases, and that reinstatement and back pay were the most appropriate remedies. *Id*., at 575. The plaintiff-employee "has the burden of proving that the dismissal violates a clear mandate of public policy." *Id.*, at 574. The burden then shifts to the defendant employer "to prove that the dismissal was for just cause." *Id*. Unless the employment contract provides for attorneys' fees (and most do not), they are not available.

Since most statutory provisions evidencing public policy will be found within the WFEA, and WFEA claims must go through the administrative process at DWD, the contract claim for wrongful discharge based on a public policy codified in the WFEA also is heard by the ALJ. *See* Response to question 2, *supra*.

4. Is there any law related to the hiring process?

Yes. In general, the WFEA prohibits refusing to hire, employ, admit, or license any individual or barring an individual from employment or labor organization membership on the basis of

> age, race, creed, color, disability, marital status, sex [gender], national origin, ancestry, arrest record, conviction record, military service, use or nonuse of lawful products off the employer's premises during nonworking hours, or declining to attend a meeting or to participate in any communication about religious matters or political matters.

Wis. Stat. § 111.321. "Creed" is defined as "a system of religious beliefs, including moral or ethical beliefs about right and wrong, that are sincerely held with the strength of traditional religious views." Wis. Stat. § 111.32(3m). "Disability" is defined as "a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work." Wis. Stat. § 111.32(8)(a). "Marital status" is defined as "the status of being married, single, divorced, separated, or widowed." Wis. Stat. § 111.32(12). With regard to age, the "prohibition against employment discrimination on the basis of age applies only to discrimination against an individual who is age 40 or over." Wis. Stat. § 111.33(1).

In the case of a disability, the law recognizes an exception where the disability is "reasonably related to the individual's inability to adequately undertake the job-related responsibilities" of the employment, membership, or licensure, as determined on a case-by-case basis, considering the present and future safety of the individual, his or her co-workers, and the general public, if applicable. The employer must show a "reasonable probability" that the individual is or would be unable to safely or efficiently perform the duties of the job. Wis. Stat. § 111.34(2).

With regard to arrest or conviction record: Wis. Stat. § 111.335(2) prohibits requesting an applicant to supply information regarding any arrest record of the individual, except a record of a pending charge that "substantially relates" to the particular job, unless the job depends upon the applicant being bondable, and the arrest would prevent the bond. A refusal to hire because of a conviction on any charge which "substantially relates" to the particular job is also exempted.

With regard to remedies, damages, and jury trial availability, *see generally* Response to question no. 2, *supra*.

5. Does the state recognize implied employment contracts under employment handbooks, policies, or practices?

Yes, under certain circumstances.

Although there are no pertinent statutes, in *Ferraro v. Koelsch*, 124 Wis. 2d 154, 368 N.W.2d 666 (1985), the Wisconsin Supreme Court ruled that an employee "handbook may, and that in the present instance it did, convert the employment relationship into one that could only be terminated by adherence to contractual terms." The handbook set forth a contractual agreement that the employer would discharge the employee only "for cause" and "set up a hierarchy of rules the infraction of which could lead to discharge," and the employee had signed to signify his acceptance of those terms. The Court found that the terms supplied by the handbook thus set forth an "express contract replete with stated consideration." 124 Wis. 2d, at

164-65.

The *Ferraro* Court found that "an at-will contract may be modified by a personnel manual, but we do not hold that all personnel manuals or employee hand books will have that effect." *Id*., at 169. The issue of whether a specific handbook does or does not form such an express contract is a factual issue. *Id*.

6. Does the state have a right to work law or other labor / management laws?

Yes.

Wisconsin has two principal labor laws, the Municipal Employment Relations Act ("MERA"), Wis. Stat. § 111.70, *et seq*., and the State Employee Labor Relations Act ("SELRA"), Wis. Stat. § 111.80, *et seq*., which govern employment relations and collective bargaining for public employees and labor organizations. In 2011, the Wisconsin Legislature enacted Act 10, which, among other things, modified MERA to prohibit general employees from collective bargaining on issues other than "base wages," prohibited fair share agreements, imposed annual recertification requirements, and prohibited municipal employers from deducting labor organization dues from the paychecks of general employees.

Madison Teachers, Inc. v. Walker, 358 Wis. 2d 1, 21-22, 851 N.W.2d 337, 347 (2014).

Act 10 also created two primary categories of public employees: "public safety employees" and "general employees"; "public safety employees" were not affected by Act 10, *id*., at 21 n.4, and 2011 Wisconsin Act 32 "reestablished collective bargaining rights for some municipal transit employees." *Id*., at 19 n.1. The *Madison Teachers* Court upheld Act 10 in its entirety. *Id*., at 20.

In *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 656 (7th Cir. 2013), the United States Court of Appeals for the Seventh Circuit held that the "public safety" vs. "general" employee classifications created by Act 10 did not violate equal protection guarantees.

7. What tort claims are recognized in the employment context?

The Wisconsin Worker's Compensation Act, Wis. Stat. Ch. 102, is the exclusive remedy for an employee injured by the employer.

In *Messner v. Briggs & Stratton Corp.*, the Wisconsin Court of Appeals noted that "[f]or years, the Wisconsin Supreme Court [has] consistently interpreted [Wis. Stat. §] 102.03(2)…as barring the maintenance of tort claims against employers." 120 Wis. 2d 127, 132, 353 N.W.2d 363, 365 (Wis. Ct. App. 1984) (*citing Beck v. Hamann*, 263 Wis. 131, 56 N.W.2d 837 (1953), *Guse v. A.O. Smith Corporation*, 260 Wis. 403, 51 N.W.2d 24 (1952), and *Deluhery v. Sisters of St. Mary*, 244 Wis. 254, 12 N.W.2d 49 (1943)).

While the Wisconsin Supreme Court, in *Coleman v. American Universal Insurance Company*, 86 Wis.2d 615, 273 N.W.2d 220 (1979), had attempted to carve out an exception for a tort action for bad faith denial of workers' compensation benefits, the legislature responded by enacting Wis. Stat. § 102.18(1)(bp), which placed bad faith denial of compensation claims squarely under the Workers' Compensation Act (that section provides for a "penalty" to be added to the final award of compensation benefits to the employee if there is a determination that the employer (or its insurance carrier) acted with malice or in bad faith). *See Messner*, 120 Wis. 2d, at 132-33.

Workers' compensation claims are also heard in the first instance by an ALJ from DWD, without a jury.

It should be noted, however, that a claim for tortious interference with one's employment contract may be possible against a co-worker or supervisor who wrongly obtained the employee's termination or prevented the employee's promotion. *See, e.g., Mackensie v. Miller Brewing Co.,* 2000 WI App. 48, ¶ 63, 234 Wis. 2d 1, 46-47 608 N.W.2d 331, 349, *aff'd*, 2001 WI 23, 241 Wis. 2d 700, 623 N.W.2d 739. The employer is not a party to the action. *Porcelli v. Joseph Schlitz Brewing Co.*, 397 F. Supp. 889, 892 (E.D. Wis. 1975) ("no claim of tortious interference with economic relations can be made against Schlitz, since a defendant's breach of his own contract with the plaintiff is not actionable"), *aff'd*, 530 F.2d 980 (7th Cir. 1976).

8. Is there a common law or statutory prohibition against discrimination / hostile work environment?

Under the WFEA, it is unlawful for any employer to discriminate against an individual in compensation, or to terminate an individual, on the basis of the individual's:

> age, race, creed, color, disability, marital status, sex, national origin, ancestry, arrest record, conviction record, military service, use or nonuse of lawful products off the employer's premises during nonworking hours, or declining to attend a meeting or to participate in any communication about religious matters or political matters.

Wis. Stat. § 111.321; *see also* Wis. Stat. § 111.355(1) (prohibiting employment discrimination based on military service).

Wisconsin recognizes the hostile work environment theory of discrimination, in a which a series of separate acts "collectively constitute one unlawful employment practice." *Bowen v. Labor & Indus. Review Comm'n*, 2007 WI App 45, ¶ 12, 299 Wis. 2d 800, 811, 730 N.W.2d 164, 169 (internal citation omitted). A hostile work environment is created when, based on the totality of circumstances, a set of incidents of prohibited discrimination have the effect of altering the conditions of employment and creating an abusive working environment. *Kannenberg v. Labor & Indus. Review Comm'n*, 213 Wis. 2d 373, 388, 571 N.W.2d 165, 173 (Ct. App. 1997). Acts creating a hostile work environment must be "pervasive and severe," not "sporadic and isolated." *Id.* at 174; *Bowen*, 2007 WI App. 45 at ¶ 13. While federal decisions interpreting Title VII are not binding, Wisconsin courts have historically looked to federal law for guidance in interpreting the WFEA. *Hamilton v. Dep't of Indus., Labor & Human Relations*, 94 Wis. 2d 611, 620 n.4, 288 N.W.2d 857, 861 (1980).

With regard to remedies, damages, and jury trial availability under the WFEA, *see generally* Response to question no. 2, *supra*.

9. Is there a common law or statutory prohibition of retaliation?

Yes. In general, retaliation is prohibited by Wis. Stat. § 230.83:

(1) No appointing authority, agent of an appointing authority or supervisor may initiate or administer, or threaten to initiate or administer, any retaliatory action against an employee.

(2) This section does not apply to an employee who discloses information if the employee knows or anticipates that the disclosure is likely to result in the receipt of anything of value for the employee or for the employee's immediate family, unless the employee discloses information in pursuit of any award offered by any governmental unit for information to improve government administration or operation.

(3) Nothing in this section restricts the right of an employer to take appropriate disciplinary action against an employee who knowingly makes an untrue statement or discloses information the disclosure of which is expressly prohibited by state or federal law, rule or regulation

Additional prohibitions also exist (*see infra*).

a. Discrimination claims

Wis. Stat. § 111.322(3) prohibits employers from "discharg[ing] or otherwise discriminat[ing] against any individual because he or she has opposed any discriminatory practice under this subchapter [the WFEA] or because he or she has made a complaint, testified or assisted in any proceeding under this subchapter."

b. Workers' Compensation claims

Wis. Stat. § 102.35(3) prohibits an employer from refusing to rehire an employee who was injured on the job. Action through the DWD under the Workers' Compensation Act is the sole method of complaint for a violation, and the penalty is up to, but not exceeding, one year's lost wages for the period of refusal. Like WFEA claims, Workers' Compensation Act claims are heard by an ALJ from DWD in the first instance.

c. Political activities

In addition to the WFEA, Wis. Stat. § 230.90(2) provides for a right of private action in circuit court against any employer, private or public, including the state, "if the employer or employer's agent retaliates, by engaging in a disciplinary action, against the employee because the employee exercised his or her rights under the first amendment to the U.S. constitution or article I, section 3, of the Wisconsin constitution" to free speech, peaceable assembly, or free exercise of religion. The statute of limitations for such a claim is two years. A jury trial is available to either party upon request and with payment of the required fee.

With regard to remedies, § 230.90(4) provides:

> (4) If the court or jury finds that the employer or employer's agent retaliated against the employee, the court shall take any appropriate action, including but not limited to the following:
>
> (a) Order placement of the employee in his or her previous position with or without back pay.
>
> (b) Order transfer of the employee to an available position for which the employee is qualified within the same governmental unit.
>
> (c) Order expungement of adverse material relating to the retaliatory action or threat from the employee's personnel file.

(cm) Order the employer to pay compensatory damages.

(d) Order the employer to pay the employee's reasonable attorney fees.

(e) Order the employer or employer's agent to insert a copy of the court order into the employee's personnel file.

(f) Recommend to the employer that disciplinary or other action be taken regarding the employer's agent, including but not limited to any of the following:

1. Placement of information describing the agent's action in his or her personnel file.
2. Issuance of a letter reprimanding the agent.
3. Suspension.
4. Termination.

d. Medical leave

Wis. Stat. § 103.10 is the state's equivalent of the Family Medical Leave Act ("FMLA"). Wisconsin courts have held that it is a violation of the Wisconsin FMLA to retaliate against an employee for exercising rights under the FMLA.

In *Burlington Graphic Systems, Inc. v. Department of Workforce Development*, 359 Wis. 2d 647, 859 N.W.2d 446 (2014), the Wisconsin Supreme Court held:

The language of the Wisconsin FMLA is clear. The statute prohibits an employer from interfering with, restraining, or denying an employee's right to take medical leave during the period where a serious health condition renders the employee unable to perform his or her employment duties.

Id. at 654. In that case, the employee was an undocumented worker who had worked for the employer for over ten years; she fell ill and took medical leave. Upon her return to work, she was terminated for being absent "too often" and at least one of the days that she had been on medical leave was counted against her for that termination. The employer argued that, since the employee was undocumented, and therefore not entitled to work in the United States in the first place, the FMLA could not have been violated by her termination. The Court found that upholding the employer's:

interpretation would create an incentive for employers to hire undocumented workers whose medical leave rights they could thereafter violate with impunity. We cannot countenance, and do not think that the [Wisconsin] legislature or Congress intended such a result.

Id., at 656.

e. Maternity/Paternity leave

Similarly, Wisconsin courts have held that it is unlawful to retaliate against employees for taking maternity or paternity leave. In *Kimberly-Clark Corp. v. LIRC*, 95 Wis. 2d 558, 565, 291 N.W.2d 584 (Wis. Ct. App. 1980), the court of appeals found that "it would not be reasonable to conclude that the [employee] was other than disabled" by her pregnancy and after-birth health needs for a three-day period (which had been the conclusion of the LIRC and court below). The court of appeals specifically noted that prior case law had found that the portion of the WFEA prohibiting gender discrimination was not pre-empted by ERISA, and therefore applied to short-term disability plans. *Id*., at 567 (citing *Goodyear Tire & Rubber Co. v. DILHR*, 87 Wis. 2d 56, 72, 273 N.W.2d 786 (Wis. Ct. App. 1978)). The court of appeals declined to revisit or overturn *Goodyear*. *Id*.

In *Kelley Co., Inc. v. Marquardt*, 172 Wis. 2d 234, 247, 493 N.W.2d 68 (1992), Marquardt took maternity leave and was placed in a different position upon her return. While there was "no dispute that Marquardt's new position upon return from leave was equivalent in terms of compensation, benefits, working shift, and hours of employment," Marquardt argued that the "other terms and conditions" of her new position were not equivalent to her old position of Credit Manager, and that "the phrase 'other terms and conditions of employment' was intended to include authority and responsibility." Because "her authority and responsibility were greatly reduced in the new position," the two positions were not "equivalent." The Wisconsin Supreme Court agreed, and found the employer in violation of Wis. Stat. § 103.10(8)(a).

f. Whistle Blowing

Wis. Stat. §§ 230.80-230.90 is commonly referred to as the "whistleblower law." Wis. Admin. Code Ch. DWD 224 implements the protections in the statute. These provisions protect government employees, except "a person employed by the office of the governor, the courts, the legislature, or a service agency under subch. IV of ch. 13." The actions prohibited are set forth in Wis. Stat. § 230.83:

(1) No appointing authority, agent of an appointing authority or supervisor may initiate or administer, or threaten to

initiate or administer, any retaliatory action against an employee.

(2) This section does not apply to an employee who discloses information if the employee knows or anticipates that the disclosure is likely to result in the receipt of anything of value for the employee or for the employee's immediate family, unless the employee discloses information in pursuit of any award offered by any governmental unit for information to improve government administration or operation.

(3) Nothing in this section restricts the right of an employer to take appropriate disciplinary action against an employee who knowingly makes an untrue statement or discloses information the disclosure of which is expressly prohibited by state or federal law, rule or regulation.

In addition, Wis. Stat. § 146.997(3) provides that certain health care employers may not take disciplinary action against employees who in good faith report violations of state or federal laws, regulations, or standards. However, in *Masri v. State Labor and Industry Review Comm'n*, 356 Wis. 2d 405, 850 N.W.2d 298 (2014), the Wisconsin Supreme Court found that medical students performing unpaid internships were not "employees" for purposes of that statute, and therefore were not entitled to anti-retaliation protection under it. *Id*., at 412.

g. Safety complaints

In addition to the protections of Wis. Stat. § 102.35(3), referenced *supra*, Wisconsin's "safe place" statute, Wis. Stat. § 101.11, establishes a general duty for all employers to provide a safe place of employment for all employees. If the employer fails in this duty and an employee is injured as a result, Wis. Stat. § 102.57, part of the Worker's Compensation Act, allows for the award of a penalty payment of an extra 15% of the damages award (up to $15,000) to the injured employee. In *Sohn Mfg. Inc. v. LIRC,* 350 Wis. 2d 469, 838 N.W.2d 131 (Wis. Ct. App. 2013), the court of appeals found that these provisions of the Worker's Compensation Act are not preempted by the federal Occupational Safety and Health Act, because of OSHA's "savings" clause regarding workers' compensation laws. *Id.*, at 474-75, (citing 29 U.S.C. § 653(b)(4)).

For public employees, Wis. Stats. § 101.055(8) protects against discharge or other discrimination because the employee raised an occupational safety and health matter or testified in a proceeding about such a matter, or reasonably refused to perform work which would put them in danger of serious injury or death.

h. Voting

Wis. Stat. § 6.76 provides as follows:

(1) Any person entitled to vote at an election is entitled to be absent from work while the polls are open for a period not to exceed 3 successive hours to vote. The elector shall notify the affected employer before election day of the intended absence. The employer may designate the time of day for the absence.

(2) No penalty, other than a deduction for time lost, may be imposed upon an elector by his or her employer by reason of the absence authorized by this section.

(3) This section applies to all employers including the state and all political subdivisions of the state and their employees, but does not affect the employees' right to holidays existing on June 28, 1945, or established after that date.

i. Jury duty / Court attendance

Under Wis. Stat. § 756.255, "No employer may use absence due to jury service as a basis for discharging an employee or for any disciplinary action against the employee."

j. Public / Private conduct not associated with employment

Wis. Stat. § 111.35 provides that is not employment discrimination for an employer to refuse to hire, suspend, terminate or discriminate against an employee for use or non-use of lawful products during nonworking hours in certain circumstances including: (1) when the organization's primary purpose or objective is to encourage or discourage use a particular product; (2) when the use or nonuse of the product impairs the employee's performance during business hours, threatens a professional license, or creates a conflict of interest; (3) an employer may offer health, life or disability insurance premiums or coverage that vary based on whether the employee uses or does not use a product, as long as the difference is due to differences in costs associated with the use or nonuse of that product; and (4) smoking, in the case of firefighters.

10. Is the state a deferral state for charges filed with the EEOC?

Yes. Discrimination complaints can be filed with the state Equal Rights Division of the Department of Workforce Development,

or with the federal Equal Employment Opportunity Commission. Whichever agency the employee chooses will then cross-file the complaint with the other.

11. Are there any state laws related to compensation, including wage and hour, paid time off, mandatory breaks, fringe benefits, allowable deductions, prevailing wage rates for public contracts, etc.?

Wis. Admin. Code DWD § 272.03 is the minimum wage statute, and provides that, as of July 24, 2009, the minimum wage for non-tipped employees, except opportunity employees, is $7.25 per hour. Opportunity employees are to be paid a minimum of $5.90 per hour, and tipped employees a minimum of $2.33 per hour. The statute's wages have not been adjusted since its effective date. Nothing prohibits any employer from paying any employee more than the minimum.

Wis. Admin. Code DWD § 272.12 provides the interpretation of what hours are "hours worked" that must be paid by the employer. Sec. 272.12(2)(a)1 provides that when an employee voluntarily continues to work at the end of his or her shift to finish assigned tasks or prepare time reports, etc., "the employer knows or has reason to believe that they are continuing to work" and the time must be paid. Sec. 272.12(2)(b)2 provides when an employee is on duty, but there are periods of inactivity not caused by the employee, such that the employee is "unable to use the time effectively for their own purposes," that time "belongs to and is controlled by the employer" and the time must be paid, because "waiting is an integral part of the job" and the employee has been "engaged to wait." Similarly, Sec. 272.12(2)(b)4 provides that an employee required to remain "on call" on the employer's premises, even if otherwise off duty, is working and the time must be paid, and contrasts this with an employee who is "merely required to leave word at their home or with company officials [as to] where they may be reached," who is not working and not required to be paid for the "on call" time.

Wis. Admin. Code DWD § 274.02 provides: "The employer shall pay all employees for on-duty meal periods, which are to be counted as work time. An on-duty meal period is a meal period where the employer does not provide at least 30 minutes free from work."

In *Aguilar v. Husco Intern., Inc.,* 361 Wis. 2d 597 (2015) – the court found that while Wis. Admin. Code DWD § 274.02 requires that an employer must allow a minimum of 30 minutes for a meal break to be unpaid – and that shorter breaks must be paid – the agency determination not to award back pay in this particular instance was reasonable because the employees' union and the employer had agreed to a 20-minute break for years, the employer had voluntarily extended the break to 30 minutes once it was discovered that there was a problem, the shorter break time had posed no health or safety concerns, and a waiver could have been sought and would have been granted pursuant to Wis. Admin. Code DWD § 274.05. *Id.*, at 620.

12. Is there a state statute governing paid or unpaid leaves?

See supra response to question #9. None of the leave time provided for must be paid, although employees can use vacation time available to them under certain circumstances.

13. Is there a state law governing drug-testing?

Currently, there is no general, comprehensive law in Wisconsin that either prohibits or regulates drug testing in the employment context; employers are free to implement their own drug-free workplace programs. However, certain public contractors on certain public works projects are required to drug test their employees. Moreover, Wis. Admin. Code LES § 2.02 requires applicants for law enforcement positions to submit to drug testing for certain controlled substances.

14. Is there a medical marijuana statute?

Yes. Wis. Stat. § 961.38(1n) permits a pharmacy or physician to dispense tetrahydrocannabinols that do not have psychoactive effects to treat medical conditions. Further, although it is not fully settled, the Wisconsin Department of Justice's view under both Republican and Democratic Attorneys' General is that CBD oil that is produced from industrial hemp growers is protected by 2017 Wisconsin Act 100, codified in Chapter 94 of the Wisconsin Statutes.

15. Is there trade secret / confidential information protection for employers?

Yes. Wisconsin has enacted the Uniform Trade Secrets Act, codified at Wis. Stat. § 134.90. Wisconsin also allows employers to enforce restrictive covenants with their employees, including confidentiality agreements, if they are reasonable. Wis. Stat. 103.465; *Runzheimer Int'l, Ltd. v. Friedlen*, 2015 WI 45, ¶ 43, 362 Wis. 2d 100, 121, 862 N.W.2d 879, 889.

In *Star Direct, Inc. v. Dal Pra*, 2009 WI 76, 319 Wis. 2d 274, 767 N.W.2d 898 (2009), the Wisconsin Supreme Court upheld certain restrictive covenants in a former employee's contract with his former employer, one relating to the former employee's ability to service customers of the former employer ("the customer clause"), and one relating to the former employee's ability to

use or disclose any information or knowledge obtained by him during his employment ("the confidentiality clause"). Both covenants were limited to 24 months following termination of employment. With regard to the customer clause, the Court found that, if not prohibited from contacting the customers at issue, the former employee would be able to approach them with knowledge of the employer's "prices and pricing strategies, proprietary marketing techniques, and profit margins" and thereby be able to undercut the former employer. *Id*., at 295-96. The Court found that both the customer and the confidentiality clauses were "reasonable as to time, territory, to [the former employee] and to the public or public policy." *Id*., at 305.

16. Is there any law related to employee's privacy rights?

a. Social media

No provisions exist in Wisconsin law specifically regarding privacy of social media posts.

b. Polygraph tests

Wis. Stat. § 111.37, part of the WFEA, governs the use of honesty testing devices in employment situations. It prohibits employers from requiring an employee or prospective employee to submit to any sort of lie detector test or to discharge, discipline, discriminate against or deny employment or promotion to, or threaten to take any such actions against an employee or prospective employee who refused, declines, or fails to submit to such a test or because of the results of such a test, or because they complained to authorities about the employer's actions in violation of these prohibitions. However, if the test is to be administered in connection with an ongoing investigation involving economic loss or injury to the employer's business, including theft, embezzlement, misappropriation or unlawful industrial espionage or sabotage, the employee had access to the property that is the subject of the investigation, and the employer has reasonable suspicion that the employee was involved, then the employer can require such testing. Wis. Stat. § 111.37(5).

17. Is there any law restricting arbitration in the employment context?

Wis. Stat. § 788.01 provides for the general enforceability of arbitration clauses in contracts. It makes an exception for contracts between employers and employees or employers and employee associations, except as provided in Wis. Stat. § 111.10, which is part of the WEPA, and provides as follows:

> Parties to a dispute pertaining to the meaning or application of the terms of a written collective bargaining agreement may agree in writing to have the commission serve as arbitrator. Parties to a labor dispute may agree in writing to have the commission act or name arbitrators in all or any part of such dispute, and thereupon the commission shall have the power so to act. The commission shall appoint as arbitrators only competent, impartial and disinterested persons.

The "commission" referenced is the state's Labor and Industrial Review Commission. It is not clear whether the flat bar on enforcement of arbitration contracts in employment agreements would survive a preemption challenge under recent Supreme Court precedent interpreting the Federal Arbitration Act.

18. Is there any law governing weapons in the employment context?

Wisconsin's concealed carry law permits an employer from prohibiting employees from carrying concealed weapons on the employer's premises, but employers may not prohibit employees from carrying concealed weapons in their vehicles. Wis. Stat. § 175.60(15m). Wis. Admin. Code § DWD 270.13(8) provides that "no minor under 16 years of age may be employed as a skeet and trap loader at a gun club."

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PUERTO RICO

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1. Is the state generally an employment-at-will state?

No, there is no employment at will in Puerto Rico. See Act 80 of 1976, as amended, “Wrongful Discharge Act”, at 29 L.P.R.A. sec. 185 et seq.

2. Are there any statutory exceptions to the employment-at-will doctrine?

Puerto Rico is not an employment at will jurisdiction. Just cause is needed to terminate an employee, unless the termination occurs during the probationary period. See Act 80 of 1976, as amended, “Wrongful Discharge Act”, at 29 L. P.R.A. sec. 185 et seq.

3. Are there any public policy exceptions to the employment-at-will doctrine?

Puerto Rico is not an employment at will jurisdiction. Just cause is needed to terminate an employee, unless the termination occurs during the probationary period. See Act 80 of 1976, as amended, “Wrongful Discharge Act”, at 29 L.P.R.A. sec. 185 et seq.

4. Is there any law related to the hiring process?

The Uniform Interstate Family Support Act, 8 L.P.R.A. §509a granted the Child Support Administration (ASUME in Spanish) the duties and powers needed to establish a State Register of new employees. When employers employ or re-employ a person on a full-time, part-time or temporary basis, they will need to provide the following information to ASUME: the employee’s name, address and Social Security number; and the name, address and federal employer identification number or the employer identification number assigned by the Government of Puerto Rico, when the former is not needed,. Employers need to furnish said information for every person they employ, even if the employee doesn’t have any child support obligations. Employers may also report their new employees through the Commonwealth of Puerto Rico Department of Labor and Human Resources' website at www.trabajo.pr.gov
As to the employment of minors, Act No. 230 of May 12, 1942, 29 L.P.R.A. §§432 et seq., establishes the requirements and obligations that employers have to follow.

5. Does the state recognize implied employment contracts under employment handbooks, policies, or practices?

The term “implied contract” is not used in Puerto Rico, but even the definition of employment or employee in Puerto Rico recognizes that through the mere act of performing a job for someone or for a corporation, a person can acquire certain protections as an employee.

6. Does the state have a right to work law or other labor / management laws?

No.

7. What tort claims are recognized in the employment context?

Act 100, 29, L.P.R.A. §§ 146, 147, 147a, 148, 149), prohibits employment discrimination based on age, gender, race, color, social or national origin, social condition, sexual orientation, or religion, and permitted those who were subjected to such discrimination to bring tort claims for damages.

The Puerto Rico Supreme Court held that the constitutional rights to dignity and privacy that appear in art. II secs. 1 and 8 of the Bill of Rights of the Puerto Rico Constitution may be asserted against private parties via a claim sounding in tort pursuant to the provisions of art. 1802 of the P.R. Civil Code, 31 L.P.R.A. § 5141".

There is no jury trial in civil cases filed in state court in Puerto Rico, contrary to what happens when filed in the Federal District Court of Puerto Rico.

8. Is there a common law or statutory prohibition against discrimination / hostile work environment?

In Puerto Rico there are prohibitions against the following types of discrimination:

a) Age;

b) Sex (includes sexual harassment);

c) Sexual Orientation;

d) Gender Identity;

e) Race;

f) National Origin;

g) Religion;

h) Impairment;

i) Marriage;

j) Social Condition; and

k) Victims of Domestic Violence or Harassment.

Act No. 100 of June 30, 1959, 29 L.P.R.A. §146 et seq. prohibits discrimination on the basis of age, race, sex, color, national origin, social origin or condition, political or religious ideas, marriage, for being a victim, or being perceived as one, of domestic violence, sexual aggression or stalking. Act No. 17 of April 22, 1988, 29 L.P.R.A. §§155 *et seq.*, prohibits sexual harassment at work. Act No. 22 of May 29, 2013, 29 L.P.R.A. §156, prohibits discrimination in employment based on sexual orientation and gender identity. Act No. 3 of March 13, 1942, 29 L.P.R.A. §§467-74 also protects pregnant employees from discrimination and dismissal under certain circumstances. Act No. 16 of March 8, 2017, known as the "Puerto Rico Equal Pay Act", is modeled after the Equal Pay Act but goes even further by limiting when employers can prove into an applicant's salary history.

9. Is there a common law or statutory prohibition of retaliation?

Act 115 of 1991, as amended, known as the Reprisals Act, is a statute that was created to protect employees from retaliation from their employers, for reason of their offering some type of testimony, expression or information, oral or written, before a legislative, administrative or judicial forum in Puerto Rico. See 29 L.P.R.A. § 194a.

Section 194a of Act 115 indicates that "(b) Any person claiming a violation of §§ 194 et seq. of this title may prosecute a civil action against the employer within three (3) years from the date in which the violation took place and request compensation for unearned salaries, benefits and attorney's fees for the real damages suffered, for mental anguish, and reinstatement in his/her job. The employer's liability regarding the damages and the unearned salaries shall be double the amount determined as having caused the violation of the provisions of §§ 194 et seq. of this title."

Act 69 of 1985, as amended, prohibits sex discrimination in the workplace, and contains its own disposition regarding reprisals. It indicates that it shall be "an unfair labor practice for an employer, labor union or joint labor-management committee that controls apprenticeship, training or retraining programs, including on-the-job training programs, to dismiss or discriminate against any employee or participant who files a complaint or charge, or is opposed to discriminatory practices, or participates in an investigation or suit for discriminatory practices against the employer, labor union or joint labor-management committee." See 29 L.P.R.A.§ 1340. Its section 1341 indicates that "[a]ny person, employer and labor union, …who is guilty of anything prohibited by this chapter:

(a) Shall incur civil liability:

(1) For a sum equal to twice the amount of damages said action caused the employee or job applicant;

(2) or for a sum of not less than one hundred dollars ($100) nor more than one thousand dollars ($1,000), in the discretion of the court, if no monetary damages can be determined;

(3) twice the amount of the damages caused if it were less than the sum of one hundred dollars ($100), and

(b) shall also be guilty of a misdemeanor, and upon conviction, shall be punished with a fine of not less than one hundred dollars ($100), nor more than five hundred dollars ($500), or imprisonment for a term of not less than thirty (30) days nor more than ninety (90) days, or both penalties, at the discretion of the court.

The court may direct the employer to reinstate the employee in his job, and to cease and desist the activity in question, in the judgment he issues in civil actions filed under the above provisions." See 29 P.R.LA. sec. 1341.

It would be a bench trial if filed in the local courts of Puerto Rico.

10. Is the state a deferral state for charges filed with the EEOC?

Puerto Rico is a deferral state for purposes of Title VII, and the Department of Labor for the Commonwealth of Puerto Rico is considered a fair employment practice, or FEP, agency. See 29 C.F.R. §1601.74.

11. Are there any state laws related to compensation, including wage and hour, paid time off, mandatory breaks, fringe benefits, allowable deductions, prevailing wage rates for public contracts, etc.?

On January 26, 2017, the governor of Puerto Rico, signed into law the "Labor Transformation and Flexibility Act", better known as the Puerto Rico Labor Reform Act, which amended many labor statutes in Puerto Rico.

Act 180 of 1998, as amended by the Labor Transformation and Flexibility Act, indicates that overtime rate was reduced from double to one-and-a-half an employee's regular hourly rate. This change only applies to new hires. Therefore, employees hired before January 26, 2017 will keep their overtime rates, if higher (can be double). Overtime rules do not apply to all workers, such as is the case with exempt employees.

Overtime will now be paid for work performed in excess of eight (8) hours in a given calendar day or in excess of forty (40) hours in a calendar week. Additionally, only eight (8) hours of rest will be required between shifts. Prior to the Act, employers had to pay overtime when their employees worked more than eight (8) hours in a 24-hour cycle or their employees rested less than twelve (12) shifts between shifts.

As per Act 180 of 1998, as amended, employees in Puerto Rico who work at least 130 hours per month, accrue 1 sick day per month, as well as vacation leave. The amount of vacation leave will depend upon the date of hire. For those hired prior to January 26, 2017, the accrual rate was 1.25 days per month.

As per Act 379, employees in Puerto Rico also need to take a 1 hour meal period, unless they work a shift of six (6) hours or less.

12. Is there a state statute governing paid or unpaid leaves?

Act 3 of March 13, 1942, 29 L.P.R. A. §467 et seq., provides paid maternity leave for a pregnant employee due to the birth of a child. Under Act No. 3, a pregnant employee is entitled to eight weeks of maternity leave. Under Act No. 3, an adopting mother of pre-schooled minors, is entitled to the same maternity leave benefits as a mother who gives birth.

The Military Code of Puerto Rico, Act 62 of June 23, 1969, 25 L.P.R.A. §2001, et al, provides that employers may not prohibit a member of Puerto Rico's military forces to be absent from work to serve in response to a call to serve in the active state military. Also, the Act prohibits the dismissal of, and discrimination against, an employee due to absences while serving. The statute also provides for leave (unpaid) for employees of the private sector who are members of Puerto Rico's military forces to be absent from work and serve either in their training or in their service.

There is also paid sick leave through Act 180 of 1998, 29 L.P.R.A. § 250 d, as amended by the Labor Transformation and Flexibility Act, in which employees that work at least 130 hours per month accrue 1 day each month, for a total of 12 days per year.

Act 28 of January 21, 2018, "Law of Special License for Employees with Serious Catastrophic Illnesses", grants six (6) additional days of leave, per year, to employees that have illnesses classified as catastrophic. These are: AIDS, tuberculosis, leprosy, lupus, cystic fibrosis, cancer, hemophilia, aplastic anemia, rheumatoid arthritis, autism, scleroderma, post- organ transplant, multiple sclerosis, amyotrophic lateral sclerosis and chronic renal disease (as of stage 3).

13. Is there a state law governing drug-testing?

Yes. Drug testing in the private sector is regulated by Act 59 of 1997, 29 L.P.R.A. § 161 et seq, as amended.

As per section 161b of Law 59, supra, the following applies in terms of drug testing:

…(b) Tests shall be administered according to the program adopted by the employer, through regulations, which shall be notified to all employees and candidates for employment. The regulations shall contain the following:

(1) A statement on the illegal use of controlled substances which includes a description of the sanctions and penalties

that apply to the production, distribution, possession or illegal use of controlled substances under the laws of the Government of Puerto Rico and the United States of America.

(2) An indication to the effects that the possession, distribution, use, consumption and illegal traffic of controlled substances is conduct forbidden in the company.

(3) A plan developed by the employer to educate and inform the employees on the health risks associated to the illegal use of controlled substances.

(4) The adoption and description of the programs for assistance, treatment or orientation on the rehabilitation available to the employees.

(5) The employer" s rules of conduct on the use of controlled substances by his/her employees and a description of the sanctions that said employer shall impose on the employees if such rules of conduct are violated or if the test is positive for the use of a controlled substance. Such rules shall be uniform and non-discriminatory…

(6) A warning that the employees or candidates for employment shall be subject to tests for the detection of controlled substances.

(7) A detailed description of the procedures to be followed to conduct the tests, including the mechanism for the settlement of disputes over the result of said tests.

(8) A provision to the effects that any information, interview, report, statement or memorandum on the result of the tests shall be deemed to be confidential information. No positive result of controlled substances detection tests administered by order of the employer shall be used as evidence in a criminal suit against the employee, unless it is used by said employee as evidence in his/her defense.

(c) The employer shall defray the expenses of the controlled substances detection tests. The employer shall deem as working time, the time needed to submit to the tests and shall compensate the employees for such time, correspondingly. The absences of an employee to attend a rehabilitation program may be charged, in the first place, on sick leave, and then on vacation leave. Should all paid leave be exhausted, the employee shall be entitled to leave without pay for a maximum of thirty (30) days.

(d) The drug tests shall be made through an urine sample, except for those circumstances in which it is not possible to take the same and shall be administered in accordance with scientifically accepted analytical and sample custody chain procedures, so that the privacy of the employee may be protected to the maximum, and pursuant to the Mandatory Guidelines for Federal Workplace Drug Testing Program…

(f) The employee shall be advised in writing that he/she is entitled to contract another laboratory to obtain a second result from the same sample, and should he/she wish to do so, the minimum amount of the obtained sample needed shall be transferred to an independent laboratory contracted by him/her, to conduct the tests.

(g) If the test conducted by the employer is positive, and the second test made at the request of the employee is negative, the employer may suggest three laboratories, of which the employee must choose one, so that a third test can be conducted at the expense of the employer. The result of this third test shall be binding on both parties.

(h) Every employee may be submitted to a maximum of two tests each year, unless a duly corroborated positive result has been obtained from one of such tests or as part of a counseling, treatment or rehabilitation program.

(i) Before the employer can take any disciplinary action based on the positive result of a test, said result shall have to be verified through a confirming laboratory test. The employee or candidate for employment shall have the opportunity to notify said laboratory of any information which is relevant to the interpretation of said result, including the use of prescribed or over the counter drugs.

14. Is there a medical marijuana statute?

Yes. There is Act 42 of July 9, 2017, "The Law to Manage the Study, Development and Investigation of Cannabis Innovation, Applicable Norms and Limits", as amended. In July 2, 2018, regulations were also issued by the Department of Health of Puerto Rico (Regulation 9038) in order to implement the aforementioned Act 42.

15. Is there trade secret / confidential information protection for employers?

The Act for the Protection of Commercial and Industrial Secrets of Puerto Rico, Act 80/2011, 10 L.P.R.A., §4131, indicates that a commercial or industrial secret is any information that has a commercial or industrial value that is reasonably protected by its owner to avoid its disclosure. These secrets don't usually have to be registered or have to comply with a specific formality in order to be protected.

16. Is there any law related to employee's privacy rights?

Section 8 of the Article 2 of the Constitution of the Commonwealth of Puerto Rico indicates that every person has a right to protection from the law against abusive attacks to his honor, reputation and his private or family life.

Section 16 of the Article 2 of the Constitution of the Commonwealth of Puerto Rico indicates that the right of every worker to protection against risks to his health or personal integrity in the workplace or job is recognized.

Sometimes, the right to intimacy can cede before other fundamental rights, like the right to the protection of property. See Castro Soto vs. Tiendas Pitusa, 159 D.P.R. 650 (2013).

The constitutional right to privacy can be enforced by an employee against his/her employer without the need for state action. However, it is not absolute.

17. Is there any law restricting arbitration in the employment context?

There are no laws restricting arbitration in Puerto Rico.

18. Is there any law governing weapons in the employment context?

No. There is a general Act of Arms, but not one in the employment context.

19. Miscellaneous employment or labor laws not discussed above?

On January 26, 2017, the governor of Puerto Rico, signed into law the "Labor Transformation and Flexibility Act", better known as the Puerto Rico Labor Reform Act (hereinafter "the Act"). The Act became effective immediately. The Act is a significant shift in Puerto Rican labor policy, which traditionally has been pro-employee. It amends a good number of the labor statutes of Puerto Rico. Major changes relate to, but are not limited to, rules applicable to vacation and sick leave, probationary periods, alternate work schedules, lactation leave, overtime, unjustified dismissal, worker's compensation, wage claims, the Closing Law and many others.

The Act applies to all employees, even those that started working prior to its enactment, unless expressly stated otherwise. Since this distinction is often made in the Act, as a practical matter, for the most part the Act applies to new hires.

A special thank you to the Primerus Labor and Employment Practice Group Executive Committee for their hard work coordinating the creation of this compendium.

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